United States Court of Appeals
for the Second Circuit

JOINT APPENDIX

76-4179

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDER OF THE FEDERAL TRADE COMMISSION

JOINT APPENDIX

VOLUME IV
Pages 2400 to 3200

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UNITED STATES COURT OF APPEALS
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I think it would be unfortunate, Your Honor, if we get to the end of this case and what we consider to be an exhaustive, exacting and expensive cost study analysis by Case & Co. on the subject of cost justification that we are left with a situation here or else were arguing about whether the total figure as appeared in column 10 of Respondent's Exhibit 41 represented points or units when that can be resolved very expeditiously today.

JUDGE HINKES: The explanation is now on the record. You can go on.

By Mr. Curnin:

Q Mr. Daube, I hand you a document which has been marked Respondent A&P Exhibit 65 for identification. Would you tell where that document came from?

A It came from the Borden files in Chicago.

Q Prepared in the ordinary and regular course of its business?

A Yes.

Q Are you familiar with documents of this type, Mr. Daube?

A Yes.

Q I ask you to read for us the captions that appear above the columns that have been numbered 2, 3, 4 and 5, if you will. I think that caption covers those four columns.

A All over the four columns is a designation of unit formula cost. Over column 2 is direct labor. Column 3 is indirect

The questioning has not shown Mr. Daube had anything to do with the preparation of these documents or who prepared it. Why?

JUDGE HINKES: Mr. Curnin, you have to establish this witness in a position to tell us the whys and wherefores. So far, all he has told us is this is a document used in business and he is very familiar with it, but he has not told us he understands why one thing is done to reflect something -- the question you just asked -- and we want to know if he is that familiar or is he giving us an opinion or a guess or conjecture of some sort. That is the thing.

MR. CURNIN: I might note for the record when Complaint Counsel sought identification of documents and beyond that to have them offered in evidence, we had documents offered in evidence by witnesses who had never seen them before, who could merely say they were records from Borden's files. A woman was here.

Documents went in because someone told her to Xerox them. She could recognize the document and knew nothing about it.

JUDGE HINKES: If you want to offer the document in evidence, fine. He has identified it as a business record. Now, you are asking him to explain something which is not apparent from the face of the document and we have to know he understands what went into the preparation of that document.

2402

By Mr. Curnin:

Q You understand, Mr. Daube, the information shown and reflected on Respondent's Exhibit 65?

A Yes.

Q Do you understand the purpose for which a document of this type with this information is prepared?

A Yes.

Q How long have you worked for the Borden Company?

A Twenty years or better.

Q Would you tell us now how the information which appears in columns 2 through 5 relates to the items which appear in the first unnumbered column?

A The unit cost factor, formula cost factor, is applied to the quantities produced to develop the dollars of direct labor or indirect labor as allocated to each product.

Q This column over here, "All Other Expenses," how does that relate to the product?

A The same basic calculation for a unit cost for all other expenses other than labor applied to the quantities produced to come up with a dollar allocation of those costs to a given product.

JUDGE HINKES: Let me ask you, Mr. Daube, how does this last one differ from the Exhibit 41? They are both production expense calculations, aren't they?

THE WITNESS: Yes.

JUDGE HINKES: The difference between them, if you can tell me just briefly.

THE WITNESS: The units produced column are the same in both.

JUDGE HINKES: I meant what does one show that the other does not show?

THE WITNESS: The one in your hand, no. 65, breaks the labor elements of production expense out from the total.

JUDGE HINKES: I see. Very well, thank you.

MR. CURNIN: Your Honor, I wish at this time to add a page to Respondent A&P Exhibit 41. We did not show the second page to the witness. In Xeroxing and in looking for a clean first page, we did not include it.

Excuse me, Your Honor, I had the wrong exhibit in my hand, and it is a two-page document.

By Mr. Curnin:

Q Let me ask Mr. Daube this question. Is page 2 of Respondent A&P-65 a continuation of the information which appeared on the first page?

A Yes, I looked at it. It is.

Q Is this information which relates to Borden's Woodstock plant?

A Yes.

Q Can you read the date which appears in the upper right-hand corner?

2404

MR. MATHIAS: I am going to object. There is nothing on the document which shows this relates to the Woodstock plant. If Mr. Daube is to testify to what this document is related, I think he has to be qualified to do so. There is no showing he has knowledge or participated in the preparation of this document.

I would ask that the last answer be stricken on that basis.

JUDGE HINKES: I think I will have to strike the answer of the witness inasmuch as there is nothing to indicate that this witness is in a position to answer the question what was posed.

By Mr. Curnin:

Q Do you have information, Mr. Daube, on which you can determine whether or not this information relates to Borden's Woodstock plant?

A The quantities, the column 1 of this exhibit, quantities produced ---

MR. MATHIAS: I will ask the question be answered that was put to Mr. Daube and that is does he have information that would establish that this deals with the Woodstock plant.

JUDGE HINKES: You want a yes or no answer. I think that is appropriate.

THE WITNESS: Yes.

By Mr. Curnin:

Q Tell us what that information is.

MR. MATHIAS: Your Honor, I would ask the witness be limited to his own personal knowledge in responding to this question.

JUDGE HINKES: Yes, of course, that goes for all of the questions that are proposed to you, Mr. Daube. We want answers based on your own personal knowledge.

THE WITNESS: Column 1 on Exhibit 65, quantities produced, agrees with Exhibit 41, Your Honor.

JUDGE HINKES: Exhibit 41 is Woodstock?

THE WITNESS: Yes, 41 is Woodstock production.

By Mr. Curnin:

Q I show you a document that has been identified as Respondent A&P Exhibit 66 for identification and ask you if you can identify that for us.

A Yes, this [illegible] a document from the Borden Company files in Chicago.

Q From the Chicago files?

A Yes.

Q Prepared in the regular course of its business?

A Yes.

Q I note that in some of these pages there are handwritten notations. Can you tell us whose handwriting is reflected there and if the handwriting was on the document prior to the time it

ms-23

By Mr. Mathias:

Q Did you personally make a check of that file?

A No, I did not. It was done under my direction.

Q Who did the search?

A Mr. Ward.

Q Is he in the Columbus office?

A No, he is not.

Q In Chicago?

A No, he is in Detroit.

Q Where were these files when Mr. Ward reviewed them?

A Chicago.

Q Did Mr. Ward give you any list of the documents that were in these various files?

A He did not.

Q On what basis was this particular document selected from the Chicago files, if you know?

A Counsel's request.

Q What was the nature of that request?

A Working with counsel he thought it would be helpful.

Q In other words, was this request made to you?

A At the time it was made to Mr. Ward, and through Mr. Ward's superior.

Q When you say working with Mr. Ward, counsel felt this would be helpful. Are you referring to ASP counsel?

A I dan't answer that specifically. I don't know whether it was A&P counsel or our own counsel.

Q Who actually did the selecting of the document, Mr. Ward or counsel?

A I don't know.

Q Do you know whether Mr. Ward was reviewing this file individually or did he have help in reviewing the file?

A I don't know.

Q Do you know whether A&P counsel assisted in going through this file to select out documents?

A I don't know.

MR. CURNIN: Your Honor, I would object to any more questions along this line. I don't see where it has any relevancy whatsoever.

MR. MATHIAS: I am trying to determine the completeness of this document. I have been told it was selected out by Mr. Ward from a large file and possibly along with counsel.

I believe I am entitled to find out whether or not there has been a very selective singling out of this document as compared to an entire document. I believe it is quite material as to the reliability of this document, its meaning.

JUDGE HINKES: I am going to allow it. You may continue.

By Mr. Mathias:

Q Do you recall the question?

JUDGE HINKES: There was no question. There was branch of the Chicago region.

Q On the inside and directing your attention to the long yellow sheet dated March 1968, route W-4 and going from there to the last handwritten entry ---

MR. MATHIAS: Excuse me. The date is March 1966.

MR. CURNIN: That is correct. It should be March 1966.

By Mr. Curnin:

Q Directing your attention to the last handwritten entry, ~~38~~83,605-1/2, can you tell us what that figure represents?

A That represents a total of the wholesale points and packages sold for this period.

Q In the month of March 1966?

A Yes.

JUDGE HINKES: You say total wholesale points?

THE WITNESS: Yes.

JUDGE HINKES: It is written on the line entitled "Retail Points."

THE WITNESS: If Your Honor will notice, four or five lines above there is opposite the side notation, "Wholesale Routes." There is a route that says total points. There are two lines with figures and those are total packages. It was the practice to show the total points and total packages as a total fro the route. In this instance, they wrote it on the line that said "Retail Points." However, this was a wholesale route and would have no retail points.

JUDGE HINKES: You may continue.

By Mr. Curnin:

Q The description "retail points" does not in fact describe the entry 83,605-1/2?

A It does not.

Q Thank you.

JUDGE HINKES: Is this already in evidence, Mr. Curnin?

MR. CURNIN: It is not, Your Honor. The route books were used as backup or source material. None of the route books have been offered into evidence.

JUDGE HINKES: I see.

By Mr. Curnin:

Q Mr. Daube, I show you a page marked Respondent A & P Exhibit 72. It has been previously identified as an expense ledger for various locations within Borden's Chicago metropolitan region. It shows expenses by location and account number.

MR. MATHIAS: May Complaint Counsel see that page?

JUDGE HINKES: Yes.

By Mr. Curnin:

Q Can you identify for us by looking at this document the location referred to there? It has a number 723.

A It represents the O'Hare branch wholesale store delivery.

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expense.

Q There are various items of expense listed here under the lefthand column entitled "Detail." Would you tell us what expenses are recorded in account four entitled "Wages-Salesmen"?

MR. MATHIAS: Your Honor, excuse me. We have the wrong page. I would like to get the copy in front of me that the witness is testifying from.

JUDGE HINKES: Mr. Curnin, has this exhibit 72 been received into evidence?

MR. CURNIN: It has, Your Honor. This was an exhibit which was identified and offered through the witness, Mr. Daube. May we proceed?

JUDGE HINKES: Yes.

By Mr. Curnin:

Q Directing your attention to the items of expense listed under "Detail", an account for wages and salesmen, would you tell us what expenses are recorded in that account?

A That would be the salary of salesmen servicing wholesale business.

Q Dropping down in that same column to account number 36, "Travel Expenses", what expenses would be recorded there?

A It would be the traveling expenses of those salesmen charged on this account.

Q Wholesale store accounts?

A Yes.

By Mr. Curnin:

Q Was this document prepared by Borden in the regular or ordinary course of business?

MR. MATHIAS: I object again.

JUDGE HINKES: I think this question is appropriate although it is leading. I think it cannot be phrased otherwise, only by going through a long discourse on how documents are prepared by this company. The witness will answer.

THE WITNESS: Yes, it was.

By Mr. Curnin:

Q Were there similar documents for this account showing the same expenses available for the period January through April of 1965?

A No. They were not available.

Q You could not locate them?

A That is right.

Q Would you tell us again what expenses are recorded here?

A Product handling and loading expenses for the Woodstock plant.

Q Does this document reflect any depreciation charged to loading expense?

MR. MATHIAS: Your Honor, I am going to object in that the document speaks for itself. There is a chart of accounts in evidence in this record. Mr. Curnin is asking Mr. Daube to take an extensive look and test his memory sales function would have theirs recorded in subaccount 36?

THE WITNESS: That portion -- that portion in 36, but that portion that related to store business would be in the 23 account 36.

By Mr. Mathias:

Q Mr. Pergler -- did the branch manager serve any functions other than sales functions?

A Yes.

Q Do you know from your own knowledge whether or not he had travel in connection with any of his other functions?

A Yes.

Q Did he have to travel in connection with some of his other functions?

A Yes.

Q Do you know to the extent that Mr. Pergler had to -- do you know whether or not Mr. Pergler had to travel in connection with the supervision of the operation of his routes?

MR. CURNIN: Before we get into questions of Mr. Pergler, maybe we can put this in proper context. Have the witness identify Mr. Pergler. Have Mr. Mathias offer a description of what he did. At this point in time in the record, we clearly understand Mr. Pergler's relevancy to this inquiry. We do not understand --

MR. MATHIAS: Mr. Pergler was the branch manager of the O'Hara Branch.

Mr. Daube tells me that this involves the travel expense of salesmen, as well as of managers engaged in sales activities. This is while they are so engaged.

My question to you, Mr. Daube, is, assuming that your answer relates to March 1966, which is the subject of our Respondent A&P's Exhibit 72, do you know whether that treatment was similar to other periods of time prior to March 1966? That is to say, before March 1966, did item 36 consist only of the travel expenses of salesmen and of branch managers while engaged in sales activities?

THE WITNESS: Yes, it did.

JUDGE HINKES: How far prior to March 1966 was that the practice?

THE WITNESS: The intent of the account, Your Honor, is to absorb the traveling expense cost of salesmen and managers involved in that activity at any point where we utilize that particular standing order number, which is 36.

JUDGE HINKES: That was for some indefinite period long before March 1966, as well?

THE WITNESS: Yes, sir.

JUDGE HINKES: That was therefore true in May of 1965, was it not?

THE WITNESS: It appears to be true; yes, sir.

JUDGE HINKES: Perhaps you can carry on, Mr. Mathias.

By Mr. Mathias:

A They may have had schools, small restaurants or confectionary type stores -- a drug store.

Q Bakeries or delicatessens?

A It could.

Q If these routes did in fact serve this type of account as well as store accounts in March of 1966, would the salaries of the salesmen include the salesmen work in contacting these customers?

A Yes.

MR. CURNIN: May I have the witness' answer read back?

JUDGE HINKES: Would you read it back please?

(The record was read by the reporter.)

MR. CURNIN: I will need the question.

(The record was read by the reporter.)

MR. CURNIN: May I have the preceeding question and answer, Your Honor.

JUDGE HINKES: All right.

(The record was read by the reporter.)

By Mr. Mathias:

Q Mr. Daube, in March of 1966 in the Chicago region, O'Hare branch, what did a salesman do?

A He contacted new customers. He contacted existing customers. On occasion he could perform a credit function in that he might go out to collect money, if necessary.

Q His principal employment was contact work; is that correct, sir?

MR. CURNIN: If he knows, Your Honor.

By Mr. Mathias:

Q If you know?

A His basic function was to develop and obtain new business for the company.

Q Was a salesman paid at this time on a straight salary basis?

A To the best of my knowledge, yes.

MR. MATHIAS: I have no further cross.

JUDGE HINKES: Redirect, Mr. Curnin?

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REDIRECT EXAMINATION

By Mr. Curnin:

Q I show you Respondent A & P Exhibit 185, page 125 and 126. During your cross-examination there were questions about cents omitted and what figures represented what. Your testimony is the figure opposite sales volume 591,943 represents points?

A Correct.

Q The next figure starts with sales total 109,421, represents dollars?

A Yes.

Q The figuresdown the column to the five million figure represents dollars?

be interested in having this on the record for a complete disclosure. Why do we shadowbox? I have said three times I will rephrase the question.

JUDGE HINKES: You may proceed.

By Mr. Curnin:

Q Addressing myself to the salaries of salesmen who solicited restaurants, hotels and institutions in March of '66, to what account were their wages charged?

MR. MATHIAS: I must object as being beyond the scope of cross.

MR. CURNIN: I think not, Your Honor.

JUDGE HINKES: You may answer.

THE WITNESS: It would be charged to location 725, account 023, bulk wholesale at O'Hare branch.

JUDGE HINKES: It would be charged to 723, account 023?

THE WITNESS: No, sir, I said 725.

JUDGE HINKES: Thank you.

MR. MATHIAS: Your Honor, I would point out the last testimony of the witness was far beyond the scope of direct or cross-examination. We have brought an entirely new account into this matter.

MR. CURNIN: The court's rules is you should not argue on rulings.

MR. MATHIAS: I am not arguing on the ruling. I am published price and discount schedules?

A To the best of my knowledge, all of the primary or principal competitors did, yes.

Q To your knowledge, did these competitors of Dean deviate from the published price and discount schedules in an effort to obtain business?

A Why they deviated, I would only be assuming, Mr. Counsel. It might have been to accomplish the purpose you are talking about. It might have been because a competitive price was offered from somewhere else that required them to deviate from it.

Q But they did deviate from the published discount schedule?

A Yes.

Q Was that true of the Borden Company during this period of time?

A Yes.

Q Can you tell us, Mr. Dean, who is the first to introduce private label milk in the Chicago market?

A I take it when you say private label, you mean a house controlled brand and not simply an unnamed brand?

Q Yes, that is correct.

A The first one we can recall, or I can recall, in Chicago, is one we managed for Jewel Food stores under the name of Yummy. This was in the early 1950's.

Q Was that in all sizes or just one size? Was it in the quart, half gallon, gallon?

A My recollection is it was in the quarts and half gallons.

Q To go back to the 1950's, when this was first introduced, what was the wholesale cost differential between the Yummy label and the Dean label?

MR. CURNIN: Objection, Your Honor. Far beyond the scope of the direct examination.

JUDGE HINKES: I don't think this witness was questioned about any costs as such.

MR. MATHIAS: He was questioned about the costing of Jewel of this product and I think this opens up the door -- it is relevant for a full inquiry to find out what the cost differential was to Jewel.

JUDGE HINKES: It may be relevant but with the ground rules that have been laid, I must insist that the cross examination be limited to the area of the direct examination and I will have to sustain the objection.

By Mr. Mathias:

Q Mr. Dean, you were asked some questions concerning Dean's sales to Centrella stores and Grocerland stores and the number of stores that were involved in your sales to those 2 voluntary groups. In the case of Centrella stores, did Dean serve every Centrella store?

A No.

Q And in the case of Grocerland, did Dean serve all Grocerland stores?

A We served all of the bigger ones. We couldn't afford to serve the small ones.

Q You did not serve the entire voluntary group?

A No.

Q Now, Mr. Dean, you were asked some questions concerning your familiarity with Borden's pricing policies and their discounting policies. How would you become acquainted with the pricing practices of the Borden Company?

MR. CURNIN: May I have that questions read back?

JUDGE HINKES: Would you read back the question?

(The pending question was read by the reporter).

MR. CURNIN: I would object to that question, Your Honor. Familiarity with Borden's pricing policies -- I think it is so broad it may be incapable of being answered, but in any event, my question was limited to Borden's use by Borden of a published discount schedule, deviations from a discount schedule. I did not go through the general range of Bordens pricing policies.

JUDGE HINKES: That is correct. I think you will have to limit yourself to that particular subject matter. I think that pricing policies covers a very much greater area than simply published prices and deviations therefrom.

MR. MATHIAS: Well, by -- strike that.

By Mr. Mathias:

Q Mr. Dean, how would you become aware of deviations by Borden from their published discount schedules?

A We might both serve some Centrella stores, for instance. The minute you get into that position, everything you put out goes to your competition, if they are serving other ones than what they put out ultimately is made available to you, not by Borden, but the customers that receive them.

Q If a customer receives an offer from Borden, that customer would report it to Dean?

A If it was more advantageous than the price he was getting from us, yes.

Q Would this always be a deviation from Borden's published discount schedule or might it be Borden's published discount schedule?

A It could be either.

Q Mr. Dean, you mentioned the experience of Jewel in the 1950's when it reduced the price on Yummy and created a differential between Yummy and the Dean brand. After Jewel opened its own dairy and started producing its own milk and selling its own milk in its stores, do you recall whether, at any time, it reduced the price on milk?

MR. CURNIN: Objection, Your Honor. One is to foundation. Two, it is beyond the scope of direct. He was asked only about Jewel's retail pricing at the time of the introduction of private label in the early 1950's.

MR. MATHIAS: I think I should be able to explore whether or not Dean, at any other time in the course of the time period covered by Mr. Curnin's direct, reduced the price on private label.

MR. CURNIN: Dean or Jewel?

MR. MATHIAS: I mean Jewel -- excuse me.

JUDGE HINKES: I think this is sufficiently tied in to what this witness has already spoken about and I think I should allow it.

MR. CURNIN: May we establish foundation?

BY Mr. Mathias:

Q Do you recall the question or would you like to have it read back?

A I would like to have it read back.

Q Would the reporter please read the question back to Mr. Dean?

(The pending question was read by the reporter, as follows:

"Mr. Dean, you mentioned the experience of Jewel in the 1950's, when it reduced the price on Yummy and created a differential between Yummy and the Dean brand. After Jewel opened its own dairy and started producing its own milk and selling its own milk in its stores, do you recall whether, at any time, it reduced the price on milk?"

THE WITNESS: As of this moment, I don't recall any on milk as milk.

By Mr. Mathias:

Q Mr. Dean, during this period of time which you are being questioned, particularly between 1965 and 1970, did Dean attempt, in its sales to its various customers, to adhere to its published price lists and discount schedules?

A Yes. That was the purpose in putting them out.

Q Now, Mr. Dean, you mentioned that Dean sold primarily through retail grocery stores -- wholesale to retail grocery stores, and where you did acquire retail business or bulk institutional business, you attempted to get rid of it as soon as possible. Now, in the Chicago area, does Dean sell to schools?

A No.

Q To restaurant chains?

A No.

Q To airlines?

A Not as part of the company's sales program. We have distributors who may sell to schools, I don't know. We wouldn't know of them. They may sell to airlines, we wouldn't know of them. We do not, as part of our own company operation service that type of an outlet.

Q No further cross, Your Honor.

MR. CURNIN: One question, Your Honor.

REDIRECT EXAMINATION

By Mr. Curnin:

Q Did the Dean Company deviate from its published price and discount schedule during the period 1965 to 1970?

A Yes.

Q No further questions.

JUDGE HINKES: Anything else, Mr. White?

MR. WHITE: No questions.

JUDGE HINKES: Thank you. You may step down.

(witness excused).

MR. CURNIN: That concludes our schedule of witnesses for today, Your Honor.

JUDGE HINKES: In which case we will recess for the day. We are scheduled to start tomorrow with a witness. That is set for 10:00 a.m. Is that correct?

MR. CURNIN: That is correct.

JUDGE HINKES: Very well. We will be in recess until that time.

(Whereupon, at 3:15 p.m., the hearing was recessed until 10:00 a.m., Thursday, March 14, 1974).

- oOo -

Q Did you solicit Consolidated Foods?

A Yes, sir.

Q Would you explain what Consolidated Foods was at that time?

A Consolidated Foods was a grocery warehouse that supplied independent groceries with their supplies of groceries. They had buying programs so that they could purchase other items through the warehouse?

Q This warehouse was located in the Chicago area?

A Yes.

Q And the customers they served were located in the Chicago area?

A Yes.

Q Approximately when did you solicit that business?

A Early in 1968.

Q With whom did you deal at Consolidated Foods?

A Principally with a gentleman by the name of Dell Johnson.

Q What was his title or position?

A I do believe his title was Sales Manager.

Q Did you have more than one meeting with him?

A Yes.

Q Approximately how many did you have?

A I would say in the course of obtaining the business we must have had seven or eight meetings with him.

Q These were meetings generally between you and Mr. Johnson?

A And also with the sales manager, Chicago, James Jensen.

Q Mr. Jensen went with you on these calls?

A Yes, sir.

Q Did you quote prices to Consolidated Foods?

A We made a proposal, yes.

Q Was this proposal at Borden's list price less a discount?

A Yes.

Q What was the discount that you quoted to Consolidated Foods?

A If I can recall, it was approximately 35 percent less, plus two percent to the warehouse.

Q What was the two percent for?

A The two percent was for the warehouse to do the billing and also pay for the milk.

Q Did the warehouse guarantee the payment?

A They guaranteed the payment of every drop of milk we delivered.

Q These were not stores owned by Consolidated.

A No, sir.

Q These were their customers?

A Right. They were all independent groceries.

Q You secured this business?

A Yes, we did.

Q How were the deliveries made, to the warehouse?

A No, to the stores.

A Yes.

Q Was there anyone else there?

A No one else that I recall.

Q What was said at that meeting?

A That we were not competitive and we did not get the business.

Q Is that what Mr. Diana said?

A That is correct.

MR. WHITE: Can we go off the record a moment?

JUDGE HINKES: Yes, off the record.

(Discussion off the record.)

JUDGE HINKES: On the record.

By Mr. White:

Q Mr. Dischner, I hand you a document which has been marked for identification RBX-22-A through U and ask you to briefly examine it.

(The document referred to was marked Respondent Borden Exhibit 22-A through U for identification.)

MR. WHITE: Your Honor, would you like an extra copy?

JUDGE HINKES: Yes, if you have one, please.

By Mr. White:

Q Mr. Dischner, could you tell us what RBX-22 for identification is?

A This is a copy of a proposal we made to the National Tea

Stores for their business.

Q Was this proposal submitted to National Tea on or about the date it bears?

A Yes, sir.

Q Did you have anything to do with the presentation or submission of this proposal?

A Very much so.

Q Would you please explain to Judge Hinkes what you had to do with its presentation?

A Between James Jensen and I we put the whole proposal together and went down and submitted it to National Tea.

Q You have testified that it was submitted on or about the date it bears.

A Yes.

Q To whom was it submitted?

A Mr. Andrews.

Q He is the gentleman referred to in RBX-22-B?

A In the cover letter, yes.

Q where did the meeting take place?

A At their offices, Division Street, Chicago.

Q At the address also indicated on the letter?

A Correct.

Q You present, Mr. Jensen was present and Mr. Andrews?

A Correct.

Q Was anyone else present.

A No one else.

Q Would you tell us, if anything, was said at that meeting?

A We went through our whole proposal to try to obtain the business.

Q Before this meeting with Mr. Andrews on about November 21, 1968 had you met with him earlier?

A Yes.

Q More than once?

A I would say we called on him at least twice before we made the proposal.

Q In what general period of time would those calls have been?

A Approximately a month prior to the proposal.

Q When you say we, you mean you and Mr. Jensen called on him.

A That is correct.

Q Would you tell us what, in general, those one or two visits involved?

A Talking about their overall business, getting a store listing, where all the sotres were located, seeing what labels they wanted to use.

Q Who was serving National Tea at that time with milk products?

A Hawthorn melody.

Q Borden was not serving this account?

A No, sir.

Q Subsequent to submission of the proposal marked RBX-22, did you have any further conversations with Mr. Andrews?

A Yes.

Q About when?

A I would venture to say a period seven to 10 days after the proposal was put in we called back on Mr. Andrews to see if we were successful in getting the business.

Q Again, when you say we, that was you and Mr. Jensen?

A That is correct.

Q What was said?

A That our prices were not competitive and, therefore, we were not successful in obtaining the business.

MR. WHITE: Your Honor, I offer at this time RBX-22 A through U.

MR. STONE: No objection.

JUDGE HINKES: RBX-22 is received.

(The document referred to, heretofore marked for identification as Respondent Borden Exhibit 22 A through U, was received in evidence.)

By Mr. White:

Q Mr. Dischner, are you familiar with the wholesale account known as K-Mart Foods?

A Yes, I am.

Q When you came to Chicago in the first part of November 1967 was Borden selling to any K-Mart Food stores?

A We had just started.

Q What city was that store located in, do you recall?

A No, I don't.

Q I hand you a document marked for identification as RBX-23-A and 23-B and ask you if that refreshes your recollection as to location of the K-Mart store.

XXXXXXXX (The document referred to,was marked Respondent Borden Exhibit 23 A and B for identification.)

THE WITNESS: Yes.

By Mr. White:

Q Where was it located, sir?

A Hammond, Indiana.

Q Would you please explain to us, if you can, what is the document marked RBX 23 A and B.

A This is a standard pricing page that K-mart used.

Q You described the form but what does this particular one represent?

A Pricing that we were selling them milk for in that store in Hammond.

Q Was RBX 23 or the original thereof submitted to K-Mart?

A Yes, sir.

Q On or about the date it bears?

A Yes.

Q This was done by your staff?

A This was done by Mr. Jensen under my direction.

Q Before this document was submitted to K-Mart, were you advised as to the circumstances surrounding Borden's pricing to K-Mart?

A Yes.

Q By whom?

A Jim Jensen.

Q What did tell you?

A These were the prices that we had to have to meet competitive conditions in the store.

Q Did he tell you who the competitor was?

A Yes.

Q Who was that?

A Beatrice Creamery, Meadwogold.

Q Meadowgold is their name or style under which they sell?

A That is correct.

Q Where was the Beatrice Plant located?

A Joliet, Illinois.

Q During this period we have been discussing namely November 1, 1967 through the end of 1968, was Meadowgold brand milk being sold in the Chicago area?

A Yes, it was.

Q You mentioned Meadowgold was the competitor. Was K-Mart also buying from Meadowgold?

A Yes.

Q So the K-Mart store in Hammond, Indiana was selling both Borden and Meadowgold.

A Yes.

Q Subsequent to 1967 did Borden make sales to K-Mart at the prices shown here?

A Yes, sir.

Q I direct your attention down the page to a line that starts "Discount and allowances."

A Yes.

Q What discount, if any, does this indicate that K-Mart was given from these prices?

A Five percent.

MR. WHITE: Your Honor, we offer RBX-23 A and B.

MR. STONE: No objection.

JUDGE HINKES: RBX 23 is received.

xxxxxx (The document referred to, heretofore marked for identification as Respondent Borden Exhibit 23 A and B, was received in evidence.)

By Mr. White:

Q Mr. Dischner, during the period October 1, 1967 through December 31, 1968, did you ever have any discussions with any representative of A&P regarding the price at which A&P would or intended to sell private label milk products at a store?

A No, sir.

Q You also gave testimony regarding competition that you experienced from your major competitors and you identified them in your testimony this same period of time, it was true, was it not, that Borden had both a published list price and a published discount schedule?

A Yes.

Q During this period of time, did Borden deviate from and have to sell below the published discount schedule?

A Competitive activities required that we did.

Q Did competitive activity require such a selling below the published discount schedule on a fairly regular basis during this period of time, November 19, 1967 to December, 1968?

A When you say fairly regular basis, I would say yes.

MR. CURNIN: No further question, Your Honor.

MR. STONE: Your Honor, the witness has been on the stand for quite sometime and it is somewhat afternoon. I suggest we take our luncheon recess now and perhaps commence with cross-examination after the luncheon.

MR. WHITE: Your Honor, if it is not inconvenient we would like to finish. This man would like to go back.

JUDGE HINKES: Off the record.

(Discussion off the record.)

JUDGE HINKES: On the record. We will take a short recess at this time.

Complaint Counsel has had an inadequate notice.

On the other hand, to allow Complaint Counsel the opportunity for deferred cross-examination in view of the belated notice to overcome some of the difficulties this has occasioned for him. Perhaps the solution is not ideal, but it is the only way that I can possibly reconcile the two different difficulties here, the difficulties of lack of notice, the difficulties of preventing essential testimony.

Perhaps Complaint Counsel will find it unnecessary to ask for deferred cross-examination; I would hope so. Perhaps he has been sufficiently prepared for this testimony despite the belated notice.

In any event, I will hear from Complaint Counsel, after Dr. Graham has completed his direct examination.

I hope that my ruling is clear, under the circumstances, I will ask Dr. Graham to take the stand.

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D. McDONALD GRAHAM was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

JUDGE HINKES: State your name, please.

Mr. THE WITNESS: D. McDonald Graham.

DIRECT EXAMINATION

By Mr. Curnin:

XXXXXX Q Will you give us first your home address and then your business address?

A My home address is 1105 South Glenwood, My business address is 1-74 Agriculture, Department of Food Science and Nutrition, University of Missouri.

Q Are you associated with the University of Missouri, Docotor?

A I am employed by the University of Missouri as Professor of Food Sciences and Nutrition and Chairman of the Sales Department.

Q Would you repeat that?

A Chairman of the Department of Food Sciences and Nutrition.

Q How long have you held that dual position?

A Since June 15, 1969.

Q What courses have you been teaching at the University of Missouri?

A I teach courses related to Nutrition, food quality, quality control, food additives and fortification of food products.

Q You talk about fortification of food products. Would that include milk and dairy products?

A It would.

Q You mentioned also, Dr. Graham, you are Chairman of Food Science and Nutrition Department at the University of Missouri. What are your duties and responsibilities as Chairman of that Department?

A As Chairman of the Department I have the administrative responsibility for all of the programs of the department. These include the research program which involves 10 experiment station projects. It includes the supervision of the teaching function and participation in teaching as already indicated and supervision of the extension function, sometimes described as the continuing education function.

Q Have those experiments that you have referred to concerned milk and dairy products?

A There is one project in which I am a direct participant which is entitled "Formulated Foods" which involves the preparation of food products fortified with various nutrients and compounded from a variety of food materials which would include milk and dairy products.

There are other projects under my jurisdiction that are conducted by members of my staff which deal directly with processing, cleaning and sanitation of milk equipment, and the engineering aspects of milk and other food processing.

Q You talk about the engineering aspects of food and other products. Would that include the engineering involved, for example, in the pasteurization and homogenization of raw milk into fluid milk?

A It would. But most specifically at the present time related to the cleanability of such equipment.

Q In connection with your role as professor and/or as Chairman of the department, do you conduct seminars at the University of Missouri and, if so, in what area?

A I conduct seminars as part of our graduate instruction programs. These vary from one semester to another. Usually involving the general techniques of research. I lecture in those seminars with regard to food additives, the labeling of food products and the fortification technology.

Q During the period July 1969 to date, did the University of Missouri operate its own fluid milk plant for the processing of fluid milk and by-products?

A It did.

Q What time period would that be?

A Approximately the first two years, 1969 and 1970, and part of 1971.

Q Did you have any responsibilities in connection with the operation of that fluid milk plant?

A The operation of the plant came under my supervision. The plant manager reported to me, and I was involved in the decisions regarding process conditions, equipment selection, standards of quality, products to be produced and similar decisions relating to the operation of any manufacturing plant.

Q That would include its pasteurization, homogenization and fortification of the product?

A Yes.

Q And the subsequent manufacture of by-products?

A That is correct.

Q What by-products were manufactured by the university's own fluid milk plant?

A Let me simply list the entire list of products as I recall them: Homogenized vitamin D milk, whipping cream, half-and-half, sour cream, cottage cheese, chocolate milk -- I believe that completes the list.

Q Were you familiar with the manufacturing process pursuant to which those by-products were created?

A Yes.

Q Do you hold a college degree, Dr. Graham?

A Yes, I do.

Q From what institution?

A I hold a Bachelor of Science Degree from Mississippi State College. The major there was in dairy manufacturing.

Q What would that include within the broad description of dairy manufacturing?

A This would include technology for processing and manufacturing of the general mix of ~~process~~ products in most dairy plants including fluid milk and products made from or with milk.

Q When did you graduate from Mississippi State?

A In 1950.

Q Did you continue your education after graduating from that institution?

A Yes. I then went to Iowa State College and completed a Master of Science degree in Dariy Micro-Biology.

Q Can you give us a description of what would be included within that course of study?

A This would be a continuation and extension of study related to the subjects mentioned earlier, with a concentration on micro-biology and its relationship to safety of the food supply.

Q When did you obtain that degree?

A I obtained that degree in 1951.

Q Did you continue your education at that point?

A I continued my education at that institution; namely, Iowa State College, and I completed the doctor of philosophy degree with a major in micro-biologyand a minor in bio-chemistry.

Q When did you obtain that degree?

A The degree was completed in 1954.

Q Have you undergone military service?

A Yes. I served in the U.S. Army.

Q During what period of time and what was your work in the Army?

A I served in 1946 to 1948 in the capacity of security related to the Manhattan Project.

Q I am not sure what the propriety is on inquiring into that subject, but I don't think we need go into it.

After you completed your military service and during the course of your educational endeavors, were you employed by any firm or institution and, if so, when was the first time you were so employed?

A May I clarify the question. Do you mean after the completion of education or during?

Q If you took a job during the course of your education, I would like t start with that.

A During the course of my education I worked in the dairy processing plant at Mississippi State College. This was a plant very similar to the one alluded to earlier at the University of Missouri, and processed a full line of milk products for the University. I worked there as an operator in the dairy plant, pasteurizing milk and responsible for the quality control funciton in the plant. This was a part-time job while I was a student in the school.

Q That would have been 1949, 1950?

A That is correct.

Q Did you assume and duties thereafter while in school?

A No.

Q When was your first job after completing your education or during the course of your education other than the one you have just described to us now?

A Upon completing my Ph.D. at Iowa State, I was employed by the Clemson College, Clemson, South Carolina as a research associate of the experiment station.

MR. CURNIN: May I have that answer read back, please.

(The reporter read from the record as instructed.)

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By Mr. Curnin.

Q Can you give us a further description of this research station at Clemson College and just what they were involved in during the period of time you were an associate professor?

A My original appointment was an associate research assistant and the additional title of associate professor. Both departments were connected with the Department of Dairy husbandry and I supervised projects relating to milk flavor, milk manufacturing.

Q How long did you hold that position?

A I held those positions for five years.

Additional responsibilities of the associate professor position included teaching of courses which included market milk, judging of dairy products and the manufacture of fermented dairy products.

Q When you talk about this course of judging dairy products, what would be involved there, Doctor?

A This would be the evaluation of sensory characteristics of dairy products.

Q How long were you at Clemson College?

A Five years.

Q When did you leave there?

A I left in 1953. Excuse me, I left in 1958. I went there in 1953.

Q When you left Clemson in 1958, where did you go, Doctor?

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A I went to the Pet Milk Company, employed in the Corporate Research Center in Greenville, Illinois.

Q What were your duties there with Pet Milk?

A Initially, I was employed as a section chief, evaporated milk. My responsibilities there were to conduct research related to processes and product development specifically applied to evaporated milk.

Q How long did you hold that title and were responsible for the duties which you have described as section chief with Pet Milk?

A For approximately two years, at which time I was promoted to the position of manager of milk products development. This included a broader area of responsibilities, with responsibilities for processes and product research related to evaporated milk, fluid milk and products made from fluid milk and dehydrated milk.

Q This switch in your position or change in your position at Pet Milk -- would that have been at or about 1961? Is that what we are talking about in point in time?

A That would be approximately correct. I don't remember the exact date.

Q As group manager, were there any fluid milk plants under your jurisdiction?

A Yes, the dairy division as described by the Pet Milk Company operated in 16 States in the Southeastern region comprising some 70 fluid milk processing plants.

Q Did those plants come under your responsibility?

A The research and related to product development was my responsibility. I had no managment responsibility for the plants, but specific technical process and product development related thereto.

Q How long did you hold that position with Pet Milk?

A Again, for approximately a two-year period at which time I was promoted to the position of associate director of research in the Corporate Research Center. This position included a broader area of responsibility, indluding the milk products gourp which had been expanded to include milk and confectionery products, to include also a support group called the Food Science Group, which included the basic scientific principles of micro-biology, nutrition and chemistry as related to the research function.

Q During what period of time did you hold that poistion?

A That would have been approximately 1965 to 1967.

Q When you held that position, did you have a budget which you were required to administer in carrying our your duties?

A Yes, I administered the budget for that sector of the research center which amounted to approximately $500,000 annually.

Q If my notes are corect, we are now up to 1967.

A That is correct.

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Q Did your title and duties change in 1967 with the Pet Milk Company?

A Yes. In 1967 I was transferred from the Corporate Research Center to the Corporate Office of the Center and appointed as Technical Director of the Grocery Products Division. In that position, I was responsible for all of the technical functions within the division including quality control, the homogenization research center, the new product development functions and process control.

Q What products would be included within the Grocery Products Divison?

A The Grocery Products Division had a very broad product line, including evaporated milk, powdered milk, a series of dietary food products sold under the brand name Sego in both liquid and dry form, a complete line of infant formula products, a line of cooking sauces, canned sour cream products and perhaps some others.

Q Dr. Graham, do you belong to any professional or scientific associations or groups?

A Yes.

Q Would you name them for us, please?

A I am a member of the American Dairy Science Association, having been a member since 1953. I have served in various capacities with that Association including Director of the Association and Chairman of the Dairy Foods Divison.

Q What would your responsibilities or duties have been as Chairman of the Dairy Food Division?

A In that position I was charged with formulating the program for the annual meeting and the review of abstracts related to technical presentations which would be made at the annual meeting.

Q Are you a member of any other professional or scientific group?

A Yes, I am a member of the American Association for the Advancement of Science, Sigma Zi, and served for six years as a member of the Technical Advisory Group of the Committee on Nutrition of the American Academy of Pediatrics.

In addition, I serve presently as a member of the Committee on Food Protection of the National Academy of Sciences.

Q You testified, I believe, that for several years you were a member of a technical advisory group to the American Academy of Pediatrics. What did your work involve there?

A The work of this Committee primarily counsel and advisory to practicing pediatrics through the preparation of manuscripts realted to the correct use of infant formulas or other infant feeding products.

Q Including infant formulas that had milk base or milk products in them?

A Including infant formulas that were totally milk products, one made from milk bases, and one made from products not including milk.

Q Have you worked in any management association groups, Dr. Graham?

A Yes. I have particiapted in a number of seminars of the American Management Association, have lectured in two seminars for the American Management Association, and I have attended the Executive Training Program of Columbia University at the Arden House.

Q Do you have any seminars that are presently underway or shortly about to start which relate to the general subject of fluid milk and by-products?

A Yes, I am scheduled to present a seminar tomorrow at the Nutrition Institute of the U.S. Department of Agriculture. The topic of that presentation is the alteration of the nutritive value of milk and milk products by processing and fortification.

Q When you talk about processing there, Doctor, are you talking about pasteurization and homogenization?

A Processing in this sense would include homogenization and pasteurization.

I might add that in January of this year, I conducted,a seminar as a part of a visiting scholars' day at Virginia Polytechnic Institute which dealt with the technology of food fortification.

Q Doctor, have you written any published articles dealing with such subjects as the processing of milk, milk products, its fortificational, nutritional value of dairy products and the like?

A Yes, and those are documented in the professional resume which I presented to you.

MR. CURNIN: Your Honor, Dr. Graham has published or authored or co-authored a rather lengthy list of publications. I think it would save time instead of trying to have him recall them or cite them from the page, I mark and offer as an exhibit in connection with Dr. Graham's testimony this 3-page summary of the publications. A copy of it has been turned over to Complaint Counsel, but I just think it would save time here. I would offer then as Respondent A&P's Exhibit 57 a summary of the publications of Dr. Graham.

MR. MATHIAS: Complaint Counsel has had no opportunity to prepare for voir dire or cross-examination on this document and in view of your prior ruling we would have no other objection. We don't know whether it is relevant or not at this time so we will reserve our right to object after we have had the opportunity for proper voir dire and cross-examination.

JUDGE HINKES: I will reserve ruling on the document. You can have it marked in the meantime and hold on to it, if you will, Mr. Curnin.

MR. CURNIN: In essence it is 57 for identification?

JUDGE HINKES: Yes.

(The document referred to was marked Respondent A&P

XXXXX Exhibit 57 for identification.)

MR. CURNIN: Your Honor, this would be an appropriate time for a break since there is a break in the subject and if it meets with the Court's approval I would suggest we take our luncheon recess at this time.

JUDGE HINKES: Shall we resume at 1:30?

MR. CURNIN: That is agreeable to us, Your Honor.

MR. MATHIAS: That is agreeable to Complaint Counsel.

(Whereupon, at 12:15, the hearing was recessed to reconvene at 1:30 p.m., the same day.)

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AFTERNOON SESSION

1:30 p.m.

JUDGE HINKES: On the record.

Thereupon

D. M. GRAHAM

a witness, previously sworn, resumed his testimony further as follows:

DIRECT EXAMINATION (resumed)

By Mr. Curnin.

Q Dr. Graham, do you hold any patents?

A Yes, I hold patents on a disposable system and a product for feeding infants.

Q Will you define for us, Doctor, what is meant by the term "raw milk?"

A Raw milk is defined as the lactile secretion of one or more healthy cows.

Q We have heard testimony here that the milk which A&P purchased from the Borden Company during the period 1965 to 1970 was pasteurized, homogenized and fortified with Vitamin D. Will you tell us what pasteurization, homogenization and the fortification of the product with Vitamin D is designed to achieve?

A Yes, These several steps must be referred to as a group of processing procedures. They are designed. No. 1, then to eliminate from the milk harmful micro-organisms that would be capable of causing disease.

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Secondly, the processing procedures are designed to extend the keeping quality of the milk again by reducing the population of bacteria that could cause spoilage, to such an extent that it is feasible to distribute the milk through commerce.

Q When you have reference to the "keeping quality," would it also be correct to describe that as the shelf life of the product?

A The two terms are usually used synonymously. There are several other purposes of the processing procedures.

The third I would list as the removal of extraneous esthetically-desirable materials such as leukocytes which are normally present in milk as secreted by the cow.

A fourth purpose would be the fortification of milk with vitamin D to improve its nutritional value and this plays a major role in the prevention of ricketts particularly among infants and children.

Another function implied in the overall processing procedures for milk is the standardization or adjustment of composition in that the composition of milk as secreted by the cow is variable and the product that is purchased by the consumer must meet a very definite standard of composition. So the standardization operation to obtain a uniform composition is an important poart of this overall processing complex.

Then a fifth function I would mention, and this alludes specifically to homogenization, would be to create

R3 a more stable emulsion or dispersion of the several constituents contained in milk, both those originally present and those added such as Vitamin D or in the case of other products Vitamin D, or other materials.

The sixth function I would mention relates to the destruction of certain enzymes which are naturally present in milk as secreted by the cow.

I would list three: Lipase, Phosphatase and Amylase. Those are the major functions now that the processing procedures applied to homogenized D milk are addressed.

Q Directing your attention to the pasteurization processes that you have had reference to, Dr. Graham, will you tell us what brought about pasteurization in the United States?

A Yes, we will need to think backward a bit in history if we may.

Let us begin at about 1900. At the turn of the centiry milk was produced on farms and typically consumed by the producer perhaps supplied to a nearby neighbor. Thus the distribution cycle was very short and milk was quickly consumed and a great deal of it was consumed, the majority of it was consumed raw as produced.

In the next ten decades- let us say from 1900 to 1920, the science of microbiology advanced to the point where the recognition of the disease-transmitting potential of milk became a reality.

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R4 There are numerous milk-borne diseases that have been ~~traded~~ traced in various outbreaks back to the milk supply, resulting from either infections of the cow such as bovine tubeculosis which can then affect man or diseases of human beings who were involved in the handling of milk such as typhoid fever and because of the infection of the individual transmitted that infection to the milk.

In 1923, the U.S. Public Health Service recognized the seriousness of this situation and the importance of milk as a vector in transmitting diseases and appointed a commission known as the Milk Investigation Commission. That Commission studied very carefully the factors surrounding the disease-transmitting possibilities of milk and concluded that safeguards were required.

They defined those safeguards in a document entitled "A Model Milk Ordinance." The Public Service, however, did not have regulatory jurisdiction in any area, so they simply wrote out a set of safeguards or standards that they felt would help to prevent the transmission of milk--borne diseases.

Those recommendations dealt with the environment in which milk is produced. They dealt with the characteristics offhand of handling, the necessary sanitation, the design of equipment, the processes and procedures and handling after processing.

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A vital part of this protective mechanism was adjudged to be the pasteurization of milk prior to its distribution to consumers.

Q This Model Milk Ordinance that you referred to as developed and issued by the U.S. Public Health Service, was that such that it became a requirement for the States, municipalities to conform to that Public Health model milk ordinance as issued by ther?

A Not at the direction of the Public Health Service but simply the model ordinance was made available to any jurisdictions that chose to use it.

The Public Health Service did encourage the adoption of this model ordinance by this jurisdictior responsible for the regulation of milk.

In the ensuing years, after 1924, progressively additional states, counties and municipalities did, in fact, adopt the model milk ordinance.

In some cases, it was necessary to make minor adjustments in the model ordinance to fit local conditions, but the basic essence of the control procedures to prevent milk being a vector of milk-borne diseases were retained.

By 1952, a majority of the States and if my memory is correct, 34 states, had adopted the model milk ordinance.

A great host of additional municipalities and counties also had adopted the model milk ordinance.

Q Is there such a product as certified raw milk?

A Yes.

Q Can you tell us what that product is or what that label designation means, "certified raw milk"?

A Yes.

However, I would need to also go back and deal a little bit with the history of why certified milk evolved.

Q Will you, please.

A In the initial proposal of the model milk ordinance which included the requirement of pasteurization, many individuals accustomed to producing and consuming raw milk objected to the requirement of pasteurization, fearing that the heat treatments would irreparably damage the milk and make it unacceptable for consumption.

At the point of time of about 1924 these were questions which were not fully answered in research. So, in order to allow for that desire on the part of the consumers a set of regulations was developed for handling certified milk.

These regulations stipulated that the herds of cows and the individuals involved in the handling process all be under very close and careful medical supervision at all times, responsible to what was called a Board of Medical Examiners, recognizing that, if diseases of the cow were controlled and if all opportunities for ~~[illegible]~~ contamination were controlled, then it would be possible to produce a milk that

R7

would not be a vector for disease transmission.

This was recognized as a very difficult and very expensive and, in the view of the public and the Public Health Service, undesirable alternative. But in view of the unknowns at that time, it was allowed for a number of years.

Now, let us come to the present. Over the years, in almost every state, the sale of raw milk to consumers even as certified milk has been discontinued and the Model Milk Ordinance now is referred to as "The Pasteurized Milk Milk Ordinance," in that pasteurization is mandatory for distribution of milk to consumers.

There are, to my knowledge, two exceptions to that. One is an area in the State of Virginia where certified milk still is sold and I believe there is one other state but I do not recall what it is.

Q Why has the sale and distribution of certified milk been limited?

A I alluded to some of the response in my earlier remarks in that the rigidity of control rendered this practically impossible.

Q Would it also be correct to say that preparation in handling of certified milk was not as effective in the elimination of disease bacteria as was the process of pasteurization?

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Mr. Mathias: Your Honor, I am going to have to object to the leading of an expert witness. I donot believe we need Mr. Curnin's words in the Doctor's mouth.

Judge Hinkes: You are quite correct about that, Mr. Mathias.

However, I do not know that this is a critical issue in this proceeding.

Mr. Mathias: Since complainant counsel has not had an opportunity for advance preparation--

Mr.Curnin: I will withdraw the question.

BY MR. CURNIN:

Q Will you tell us why the sale and distribution of certified milk as stated has been limited as you outlined?

A: I indicated originally that the Public Health Service recognized the difficulties which the distribution and control of the quality of certified milk presented, alluding to the cost and the impracticality of its control.

Let us visualize the production and distribution of the milk supply into a large city such as Washington, D.C. The milk comes from thousands of cows, it is handled by countless individuals in many locations, is piped, pumped, transported, commingled with milk from many other sources and eventually finds its way to the consumer.

Dealing with raw milk produced under the conditions necessary for certified milk, one slip anywhere in that chain would allow the contamination of milk with potentialy disease-producing bacteria.

These would be such things as I have already alluded to such as typhoid or diptheria or "strep" throat or any other number of others we might mention.

I think, if that condition prevailed today, none of us living in large cities would dare to purchase milk and consume it without boiling it first.

In some areas of the world where the technology for processing milk and including pasteurization has not evolved and the necessary refrigeration and care after processing has not evolved, it is necessary to boil milk immediately prior to use.

This is a risky and laborious process. It damages the suitability of the milk for consumption and, to some extent, impairs its nutritional value.

However, we do know, in fact today that our population readily buys milk in the supermarket or in restaurants with full confidence, because , after the assembly process as I have described, at the last moment before packaging, milk is subjected to the pasteurization process which, even though there may have been some contamination with potential disease-producing bacteria or other spoilage type bacteria which would not necessarily produce disease but would harm the quality of the product.

This final pasteurization step, then, is a primary

R10 safeguard for the public health and the quality of the milk as distributed to consumers.

Q Would you briefly define for us the methods used to effect pasteurization of raw milk?

A. Yes. Pasteruization as defined in the model milk ordinance or the pasteurized milk ordinance as it is now called may be accomplished by heating every particle of milk to 143 degrees Fahrenheit, holding it at that temperature for 30 minutes and then cooling it. Or, alternatively, by rapidly heating it to 160° Fahrenheit, holding it at that temperature for a minimum of 15 seconds and rapidly cooling the product.

Furthermore, the ordinance permits other variations of process time and conditions which are adjudged equivalent on the basis of a test called the phosphatase test.

The phosphatase enzyme is one of those naturally-occurring enzymes in raw milk that I mentioned earlier. Its heat-resistance is just slightly greater than that of the bacteria which causes tuberculosis.

This generally is considered to be the most heat-resistant of the bacteria that are likely to be found in milk and cause human disease, so that the destruction of phosphatase, then, is evidence of adequate pasteruzation.

Q We have had prior testimony in this case that at Borden's processing plant in Woodstock, Illinois, raw milk was pasteurized by heating it to a temperature of 175° Fahrenheit--

R1½ Following the termination of the pasteurization process at the end of the holding tube, then as quickly as practicable afterwards, the temperature of the milk is reduced to the storage temperature which is normally about 35° Fahrenheit.

Q What is the importance of reducing it to that temperature and holding it at that temperature?

A. Prolonged heating produces flavors which are normally referred to as cooked flavors, and as those times and temperatures are extended beyond a fairly narrow zone of safety begins to endanger the destruction of some of the nutrient characteristics of milk.

The most sensitive nutrients would be Vitamin C, Vitamin B-1 and Vitamin B-12.

Q Is your testimony then that if the raw milk is overcooked, if I may use that expression, subject to high temperatures beyond a certain range, that the other nutrients in the product will be destroyed?

A. They will not be destroyed totally but they will be diminished in concentration. This progresses linearly as the temperature increases and, as the time is extended.

Q You described the enzyme Lipase is destroyed or eliminated as a result of the pasteurization process. Would you tell us what lipase is?

A. Lipase is a natural constituent of milk. It is a complex molecule that is present in milk because it is involved in the synthesis of milk fat.

This residual lipase in milk has the ability, in simple terms, to digest or destroy fat and to release free fatty acids from the normal triglycerides structure of milk fat.

The release of these free fatty acids leads to a condition that is referred to as rancidity in milk, producing a very objectionable taste and odor.

So the destruction of lipase in the pasteurization process is an important point.

Q Does proper or effective pasteurization as you have described it require that it be conducted under strict controls?

A Yes, that is attested to in all of the ordinances such as I have referred to.

Let me explain this in just a bit of detail. For example, in the high-temperature, short-time system which is the one under discussion here holding at a minimum of 160° Fahrenheit for 15 seconds, the pumps which control the flow rate through such a system are sealed by the Health Department or the regulating authority so that their flow rate may not exceed that which would give a minimum holding time of 15 seconds for a system pasteurizing at 160°.

In addition, located at the end of the holding tube

R28

(Record read.)

THE WITNESS: Mr.Tice indicated that the pasteurizing system installed at the Woodstock plant was a creamery package, high-temperature system. I believe the point of your question, Mr.Curnin, however, related to the type of controls that would exist in this type of system.

BY MR. CURNIN:

Q That is correct.

A. I believe that is very simple to answer without reference to the manufacturer or type of equipment, because the flow diversion valve and the temperature recording system that I just described earlier is a legal requirement regardless of the manufacturer or the type of pasteurization system.

So, those basic points would be valid regardless of the type used.

Q To your knowledge, was this a legal requirement during the period 1965 through 1970?

A. Yes.

Q In your opinion, can proper pasteurization be brought about by a user, a housewife, boiling the raw milk at the required temperature for the required time period?

A No.

Q. Why?

A. As we have already discussed, the control of time, temperature, rapidity of heating and rapidity of cooling all are important in insuring the destructio of the necessary bacteria and enzymes and, at the same time, avoiding excessing heating in order to preserve the flavor and nutritional properties of the product.

It is my opinion that this is a very precise set of conditions which have evolved over many years of research, and that a portion of those requirements could be met simply by boiling milk.

This, however, would greatly damage its taste, its texture and diminish its nutritional value. So, I do not believe that effective and proper pasteurization as we view pasteruized milk in the marketplace today can be accomplished with a simple heating process on a stove.

JUDGE HINKES: Let me ask you, Dr.Graham, at what temperature is the raw milk entering the pasteurization equipment?

THE WITNESS: Approximately 40° Fahrenheit.

JUDGE HINKES: How quickly does it get up to 160° if that is the desired temperature?

THE WITNESS: Within just a few seconds.

JUDGE HINKES: How few?

THE WITNESS: Less than a minute.

JUDGE HINKES: How long is it kept at the desired temperature? Is it 15 seconds or so?

R25

THE WITNESS: It must be kept there for 14 longer and a few additional seconds, five but less than 10 seconds, and then the milk is cooled and very rapidly again in less than a minute back to 35° Fahrenheit for storage.

BY JUDGE HINKES:

Q As I understand your testimony, an ordinary housewife could not raise the temperature of her raw milk to 160° within less than a minute keep it there for 20 seconds and then cool it again?

A That is my contention, yes.

JUDGE HINKES: You may continue.

THE WITNESS: If I may amplify for a bit for your full understanding, in such a situation, let us visualize a sauce plan onthe stove. The surfaces in contact with the heat would be very, very hot, with respect to the low temperature of the mass of the product in the pan and this is a process that has kept, we have kept in mind in designing the high temperatures pasteurizing system so the heating process is rapidly renewed so there is only minimal heating above the set temperature to which the milk is supposed to go.

BY MR. CURNIN:

Q Dr. Graham, a few times you referred to pasteurization by the process of high temperature, short-time, by this do you have reference to heating to 160° at 15 seconds?

A Yes.

Q Turning now to the next step in the process you hav described, and here I have reference to homogenization. Will you tell us what is the purpose or what purposes are to be achieved by homogenization?

A. Homogenization is intended to create a stable emulsion and a uniform distribution of all of the constituents in a milk product.

I must give a more complete explanation in order to really make this understandable. If I may, I would like to deal with fortification at the same time because I think it is a vital part to our full understanding here.

Q When you talk about fortification, do you mean adding Vitamin D to homogenized milk?

A. Vitamin D or any other Vitami[illegible] that might be added.

Let us deal specifically with the case of homogenized Vitamin D pasteurized milk. We must think of all of these together because they are an integrated processing system and not very conclusive to treatment as individual operations.

When Vitamin D is added to milk, we must recognize that it is a fat soluble vitamin. The present practice is to add a Vitamin D concentrate. In order to assure the dispersion and uniform mixing of the Vitamin D throughout the mass of milk, very vigorous agitation at the time of addition is necessary and then a stable emulsion must be created so that that product will not separate during storage and distribution.

R27 Homogenization accomplishes this purpose, by rupturing the present globules in milk, shredding or decreasing their size, stripping away the globule membrane creating a situation where the fat globules will no longer float to the top of the product.

The importance of this was recognized in the 1949's when Vitamin D fortification of milk was first attempted.

Q Will you tell us why that was attempted and, if you will, include within that the desirability of uniform distribution of Vitamin D which you had reference to in your testimony.

A Again, going back just a bit in history, about 1920 the nutritonal definiency disease ricketts was recognized.

Q Will you describe for u s, Doctor, the effect of that disease?

A Ricketts is a disease which results from the inactivity of the human organism to deposit calcium in the bony structure of the body, resulting in bowed legs or enlarged knes joints or a condition referred to as pidgeon breast where the breast bones are enlarged, all resulting from the same basic cause of inability to calcify the bones.

In this early period from 1920 to 1930 research developed that three principles were necessary for the prevention of ricketts. One was an unidentified compound brought out at that time but named Vitamin D.

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R28 The other two principals were calcium and phosphorus. Nutritionists at that time began to search about for the means for providing those three essential nutrients in the human body, in the human diet and particularly in the diet of infants and children.

It was not an easy task and there seemed to be no universal vehicle. As knowledge over the area progressed, it was recognized that milk naturally contained calcium and phosphorus.

The problem remained of addition of Vitamin D to the diet. A number of different methods were attempted. One of those was the direct administration of Vitamin D. Concentrates which, at that time were commonly referred to as fish oil and a very rich source of Vitamin D but a very uncertain material to consumer.

A second way was a process called "irradiation" where in a natural occurring fatty material in milk which is unavailable to the human digestive system as Vitamin D chemically be converted to Vitamin D by a strong exposure to a strong ultra violet light. This was a method used to increase the Vitamin D potency of milk as part of the pasteurizing process.

It proved to be a very uncontrollable operation and because of the type of equipment required, and unsanitary type of operation it defeated the intent of the process.

As time went on, the advisability of making Vitamins that could be preassayed or tested for potency became possible.

I think it is important to indicate here the assay for Vitamin D is a laborious and time-consuming operation requiring several weeks and no way is possible to add Vitamin D to fluid milk and then hold it long enough to do an assay, to determine the potency that has been added.

For this reason, it has been necessary for the dairy industry in cooperation with regulatory officials and researchers to evolve a method of adding a pre-tested Vitamin D concentrate of known potency and then dispersing that concentrate throughout the body of a large mass of milk so that its dispersion is uniform throughout all portions of the product.

This is important for several reasons.

In the 1940's the typical milk sold was referred to as "cream line milk," wherein the milk was not homogenized, the cream readily separated and floated to the top of the container.

JUDGE HINKES: Let me interrupt for a moment.

Is all of this necessary, Mr. Curnin?

MR. CURNIN: I think it is in several areas, your Honor.

JUDGE HINKES: Are we interested in the historical production of milk?

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MR. CURNIN: I think we should be interested in the historical importance of, and the reasons for including additives, Vitamins to raw milk. I think the--

JUDGE HINKES: In what way is it relevant to this proceeding?

MR. CURNIN: It is relevant to show both the importance of adding Vitamin D to the product, the results that the additives of Vitamin D achieve how Vitamin D can only be added to raw milk only after certain other steps have been taken and ultimately to show by adding this particular Vitamin, you are dealing with a new product which has distinct purposes and aims,

JUDGE HINKES: I can understand your objective to demonstrate that the fortified poroduct is a new product, but I do not think we are interested in finding out so much about its value or at what point it can be fortified. What we are interested in knowing is in what way it is a different product. I would like to get to that as quickly as possible.

MR. CURNIN: I think we are at that point, your Honor. I think it is also important for your Honor to know and for the record to reflect this additional area and that is an evaluation or a recognition of the engineering and scientific development that led to the change in the product. I think your Honor raised the question and Complaint counsel raised the question during Mr.Tise's

R3li examination and I think I am characterizing it correctly--well, isn't the addition of Vitamin D merely a mechanical process as distinct from some other kind of process? I anticipate that the argument that will be made, and that the response to that question is we are dealing with a simple, uncomplicated addition to the product which is not brought about by the use of technically sophisticated or scientifically developed equipment and, therefore, the change in the product is minimal and, in fact, does not result in any change in the product at all.

I think when your Honor hears the testimony of the witness and the background which we have concluded, you and others reading in the record are in a better position to realize this is not simply a mechanical process.

JUDGE HINKES: I am not prepared to rule as to whether ornot it is a mechanical process but the testimony would appear to be that it is a mechanical process in that a substance is added in known quantities to the raw milk. It may have taken a lot of work and scientific discovery to find out just what kind of a substance should be used and how much and how it should be used, but that is not the same as saying that the process itself is purely mechanical.

MR. CURNIN: Your Honor is correct. What I meant to say is it is not simply a mechanical process.

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R3½ I do not disagree with the Court that the adding of the required amount of the Vitamin D to the product is in fact a mechanical process.

What I am saying is that it is not simply a mechanical process that is unsophisticated.

JUDGE HINKES: I will allow you to go on, but I must say I think we are going far beyond any real need in this proceeding.

MR. CURNIN: I think we have covered most of the background of the information that we wanted to put on the record in this regard, our Honor.

MR. CURNIN: May I have the witness' last portion read back.

(The record was read.)

BY MR.CURNIN:

Q Would you complete your statement?

A Under those circumstandes, the addition of Vitamin D to the milk would create a non-uniform dispersion or distribution of the added Vitamin to consumers of the product, since Vitamin D is fat soluble and would appear in the cream layer that separates. Thus, it was recognized as necessary t to introduce homogenization as an additional processing step in order to insure the necessary uniformity so that all consumers of the product would receive the proportionate share of Vitamin D intended.

I believe I started to say this was important for several

RB3 reasons.

One is so that in the separated product, the creamery rich layer would contain more than the recommended level of Vitamin D. The skim milk or the fat-portion of the milk would contain less than the recommended level of Vitamin D.

In the final process, this defeated the purpose of the uniformity or uniform fortification. Vitamin D in excessive quantities is toxic or in deficient quantities leads to the condition of ricketts as already described.

So the insurance of uniform distribution throughout the product was of particular importance and led to what was really considered at that time throughout the dairy industry as a major change in the character of the product being sold.

BY MR. CURNIN:

Q You told us one purpose of homogenization which had to do with the uniform distribution of fat globlues through the product. Is there another purpose which is to be achieved or sought to be achieved by homogenization?

A This is right. There is another result which was discovered as a result of homogenization and that is that the process of homogenization denatures or unfolds, if you will, the protein molecules, primarily casein and results in a substantially lower curd. When milk is coagulated by acid and enzymes such as occur in the human digestive tract a curd is formed. In the case of

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homogenized milk, the firmness of that curd is greatly reduced and this increases the digestibility of the curd and specifically in the case of infant feeding substantially reduces the incidence of colic or digestive disturbances in the infant.

MR. CURNIN: Your Honor, I have completed another subject and with the Court's permission, I would suggest this would be an appropriate time for a recess.

JUDGE HINKES: Let me ask one question before we break off.

Isn't skim milk fortified with Vitamin D on occasion?

THE WITNESS: Yes, your Honor. Skim milk may be fortified and is typically fortified by both A and D.

JUDGE HINKES: How is this done in the absence of fat?

THE WITNESS: The Vitamin D and A are added in a small amount of fat carrier which is then homogenized into the milk.

JUDGE HINKES: Couldn't that same process be used for milk that is not homogenized?

THE WITNESS: No, I donot believe I quite understand the import of your question.

JUDGE HINKES: You say the Vitamin D would be concentrated in the non-cream portionof the milk?

THE WITNESS: If this were done in skim milk, the fatty

carrier would float to the surface and you would have a very high concentrationof the added Vitamin D and Vitamin A which is usually added at the top even in skim milk.

JUDGE HINKES: Do you mean then the first cup full of skim milk is much more fortified than the rest of the quart?

THE WITNESS: No, because skim milk is typically homogenized, also, in order to insure the dispersion of the added Vitamins and the reduction of the curd tensior occurs as I have just described for skim milk, also.

JUDGE HINKES: There is no Vitamin D that is usable except in the form that you have suggested, that is fatty-associated?

THE WITNESS: Vitamin D in itself is a fatty material so that in some way it must be pre-emulsified and uniformly dispersed throughout any product to which it is added.

JUDGE HINKES: Those are all the questions I have on this subject at this time.

We will take a short recess at this time.

(Recess)

JUDGE HINKES: On the record.

BY MR. CURNIN:

Q In your opinion, Dr. Graham, are there certain biological, chemical and physical changes brought about in raw milk as a result of the pasteurization and homogenization?

A Yes.

R36 Q Can you identify for us the biological changes that occur as a result of pasteurization and homogenization?

A The biological changes I would define as the destruction or killing of micro organisms.

Q These are the ones that would transmit typoid fever?

A They would be the ones I already described in my earlier comments--those that are capable of producing diseases such as typhoid fever, undulant fever, scarlet fever and those capable of causing spoilage of milk.

Q Would you identify for us the chemical changes that are brought about by pasteurization and homogenization?

A The chemical changes would be specifically the destruction of lipase, phosphatase amylase and traces of other enzymes that occur in milk.

Q You have referred to amylase before in your testimony. What is that?

A Amylase is an enzyme that is elaborated by the udder of the cower and is involved inthe synthesis of the lactose--milk sugar--and really plays no other role in the milk product.

Q Would you identify for us the physical changes which are brought about?

A The physical changes would refer to the rupturing of the fat globules, the removal of the membrane from the native fat globule, decrease in the size of the fat droplets, R3 the denaturization or the unfolding of the protein molecules.

Q In additionto the effects which can be demonstrated in the laboratory such as the reduction in size of the fat globules and the enzymatic activity that you referred to, curd tensions, the differences between raw milk and pasteurized homogenized milk that can be physically viewed with the naked eye?

A Yes, raw milk on sight particularly after having been refrigerated or a few hours would be readily distinguishable from pasteurized homogenized milk.

Q In what way?

A In two ways.

The whiteness or opacity of homogenized milk is greater than that of raw milk.

Secondly, the cream layer on raw milk would not appear on homogenized milk and these would be particularly visible on sight.

Q Are there other differences that can be discerned by means of taste or smell?

A Yes, raw milk particularly after standing for perhaps 24 or 48 hours refrigerated will begin to develop a rancid odor or rancid taste due to the action of the lipase enzyme. That action can be accelerated by the warming and cooling of the product which frequently occurs in its handling or by any agitation or mixing which also may cause it to foam. This will greatly accelrate the action of lipase in raw milk.

R38 Whereas, pasteurized homogenized milk can be allowed to stand for periods of ten days or longer with no visible separation and no development of rancidity.

There is another way that is very simple and practical to demonstrate without laboratory procedures, the difference between the two.

If one adds only a minute amount--I am referring to a few CC's of raw milk to homogenized, pasteurized milk, then the mixture will very rapidly become rancid. This is because of the presence of the active lipase in the raw milk and only small amounts are required to produce rancidity.

Q In your opinion, Dr. Graham, would it be correct to say that pasteurization, homogenization and the addition of Vitamin D to raw milk occurs as the result of the use of expensive and precise equipment?

MR. MATHIAS: Your Honor, I donot know how to object but I wish Mr. Curnin would resist from using such detailed leading questions of the witness.

JUDGE HINKES: Of course, there is no way of instructing Mr.Curnin in advance of the questions. I can only say that so far as he obtains answers from leading questions, the answers are not very helpful in a resolution of any of the difficulties this case presents.

MR. CURNIN: I will rephrase the question.

R39 BY MR. CURNIN:

Q Well, how would you describe the equipment that is used in a dairy, and I ask you to keep in mind the information you have as to the processing equipment that was in use at the Woodstock plant of Borden, that is used in pasteurizing, homogenizing and fortifying raw milk?

MR. MATHIAS: I am going to object here to the injection of the Woodstock plant.

First of all, it has not been established that this witness has detailed knowledge of the information of the equipment at the Woodstock plant. He, obviously, has never visited the plant and I believe that insertion into this question makes it objectionable.

JUDGE HINKES: I will have to sustain the objection. I think you will have to establish from this witness two things. First, that he is familiar with whatever goes on at Woodstock one way or the other.

For another thing, that he is familiar with the costs of these pieces of equipment. Neither point has been developed so far.

MR. CURNIN: Yes, your Honor.

BY MR. CURNIN:

Q Are you familiar or do you know what equipment was used by Borden in its Woodstock plant in connection with its pasteurization, homogenization and fortification of raw milk?

BY MR. CURNIN:

Q Are you familiar with equipment used at the Woodstock plant for pasteurization, homogenization?

MR. MATHIAS: I would like the witness to be instructed to answer from his personal knowledge.

MR. CURNIN: He need not be restricted.

JUDGE HINKES: We need to know how he knows.

Are you familiar with the Woodstock equipment?

THE WITNESS: Only in the telephone conversation which I alluded to where Mr.Tise explained to me the type of pasteurization system the plant contained.

BY MR. CURNIN:

Q In your opinion, Dr.Graham, is that equipment highly sophisticated and expensive?

A Yes, it is one of the types I mentioned in my summary of the types of equipment available.

Q Do you consider the process by which raw milk is pasteurized, homogenized and then fortified to be a negligible process?

A Would you repeat the question?

MR. MATHIAS: I will object again to Mr. Curnin leading the witness. I believe there is no question that many of the questions being put to this expert witness have been quite leading. Again he is indulging in the practice and in spite of my repeated objections; I am objecting to that

R46 A In Mr. Tise's testimony as I recall, he indicated that the skim milk they produced contained added Vitamins A and D.

Q In your opinion does that in addition to other changes that are made in product produce a physically different product from raw milk?

A From the standpoint of the user or the consumer, definitely.

Q In your opinion was the two percent milk produced by Borden physically different from the raw milk?

A Again the same principles would obtain and my answer would be yes.

Q In your opinion, was the chocolate milk produced by Borden a physically different product from raw milk?

A The chocolate milk clearly is different because not only of the processing but of the addition of additional materials to create a mixture rather than a single-entity product which is raw milk.

Q Here do you have reference to chocolate powder, sugar and other such items?

A Chocolate, sugar and other additives.

Q In your opinion, was the buttermilk produced by Borden physically different from raw milk?

A Yes.

Q In your opinion was the "Half-and-Half" product produced by Borden physically different from raw milk?

A Yes.

Q In your opinion, was the sour cream produced by Borden physically different from raw milk?

A Yes.

Q In your opinion was the whipping cream produced by Borden physically different from raw milk?

A Yes.

Q What about the product "Egg Nog" produced by Borden, do you consider that to be a physically different product from the raw milk?

A Yes, it is subjected to perhaps even more changes than the other products we have mentioned.

Q I have not asked you specifically your response why you feel the products are physically different for half and half, sour cream and whipping cream. Can you summarize that for us as it relates to those three products--Half and Half, sour cream and whipping cream?

A Let me deal with the three separately.

In each case the composition differs substantially from that of raw milk. Also in each case the process of pasteurization has been applied. They are not exactly the same processes of pasteurization as applied to fluid milk but they involve higher heat treatments ~~than~~ in the case of sour cream and whipping cream.

The physical nature of the three products as regards viscosity, taste or visible factors evident to any consumer are quite different.

Q. You said that in your opinion the buttermilk as produced by Borden was physically different from the raw milk. In what way, Doctor?

A. In the manufacture of buttermilk, in addition to extensive heat treatment to render the skim milk product essentially free of bacteria, then a selected bacterial culture is added to it to convert the lactose milk acide and we are all familiar with the viscosity of buttermilk, the obvious difference in taste between that and raw milk as such.

Q. In your opinion was the opion dip produced by Bordeon a physically different product from raw milk?

A. In this case, Mr. Curnin, I think they are so different that comparison is essentially superfluous.

Q. Bear with me, if you will, so that the record will speak to us, tell us why you consider it to be physically different product from raw milk?

A. Onion dip would be readily distinguishable by any consumer as a different product than raw milk because of its taste, its appearance, its consistency, by virtue of its label in commerce showing the addition of other ingredients and the intended use would be quite different.

MR. CURNIN: Thank you, Dr. Graham.

I have no further questions, your Honor.

JUDGE HINKES: Mr. Mathias.

PROCEEDINGS

JUDGE HINKES: The hearing will be in order.

I believe we have scheduled for today the continued cross-examination of Dr. Graham.

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XXXX D. M. GRAHAM resumed the stand and testified further as follows:

JUDGE HINKES: Let me remind you that you are still under oath. You may proceed with cross-examination if there are no preliminary matters.

XXXX CROSS-EXAMINATION (continued)

By Mr. Stone:

Q The other day, while you were here, you discussed pasteurization as a health measure to some degree. Isn't it true that pasteurization is required by law before milk can be shipped in interstate commerce in containers?

A Yes.

Q Would you recommend that a consumer purchase raw milk for his own consumption?

A I would not.

Q Also during your testimony the other day, you pointed out that the HTST method of pasteurization was only one method of pasteurizing milk and that milk could also be pasteurized by heating every particle of milk to 143 degrees Fahrenheit by holding it there for 30 minutes and then cooling it. Could you

MR. CURNIN: That may be. I have not heard the witness answer. Maybe the reporter heard it, but I made a rather routine request.

JUDGE HINKES: Let us have the reporter read the question and read the answer. I heard an answer. Perhaps the reporter did, too. And, if so, we will go on from that point.

(The record was read by the reporter as requested.)

JUDGE HINKES: What is your point, Mr. Curnin? Is it the use of the word "statement"?

MR. CURNIN: I just wanted to know, your Honor, so the record could be clear to what statement counsel was referring. We just have the statement but no identification. I think, one, it should be identified on the record, and I would ask complaint counsel if he intends to mark the statement for identification. If not, I intend to do so.

JUDGE HINKES: In any event, I think the question can be rephrased so there will be no question as to what the witness is answering.

In your question, Mr. Stone, would you be specific about the statement you are referring to so the witness will be aware of what you are asking?

MR. STONE: Your Honor, I don't think the reference to the statement was necessary.

By Mr. Stone:

Q Let me just ask, Dr. Graham, if the composition of milk proteins is changed as they are unfolded by the homogenization process or to the extent they are unfolded by the homogenization process.

A The actual composition, as one would determine by chemical elemental analysis, is not changed. The physical form and structure of the molecule is changed, so that subsequent changes can take place more readily than they would have before. But the act of homogenization itself does not alter the composition.

Q You also mentioned, in connection with the homogenization process, that the membrane around fat globules is stripped away as the homogenization process takes place. I take it that homogenization does not remove anything from the milk, does not remove this membrane from the milk?

A It removes it from the fat globule but not the resultant mixture. In fact, it shreds or tears the globule apart, so its integrity is lost.

Q Dr. Graham, in your opinion, does the fortification, pasteurization, and homogenization of milk seriously impair its nutritive value?

A I would like to have the reporter read the question back if I may.

JUDGE HINKES: Yes; read it back.

(The pending question was read by the reporter.)

THE WITNESS: My answer is no. In fact, the

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fortification adds to the nutritive value.

By Mr. Stone:

Q I noticed the other day that you mentioned that vitamin C was one of the nutrients which was affected by overheating in milk. Isn't vitamin C in milk also destroyed by light?

A Yes; vitamin C is destroyed by light, by oxygen, and by heating.

Q Are any other vitamins also affected by these factors?

MR. CURNIN: Are we talking about vitamins in milk or vitamins generally?

MR. STONE: Vitamins in milk.

THE WITNESS: No, not by all three. Thiamine, or vitamin B_1, as I referred in my testimony, is destroyed by heating.

By Mr. Stone:

Q Dr. Graham, are you appearing in these hearings as a consequence of any financial arrangements or any contract with A and P?

A I would not say by a contract. Would you like for me to explain the arrangements?

Q Yes; would you, please?

A Mr. Curnin called me in January, on January 4 of this year, and he explained that, in this case, which I was not aware of, a question had arisen concerning the effects of processing steps on milk products and alluded to the two questions I that matter that I would be free. I am not sure whether it is Wednesday. I will have to check my calendar at lunchtime and determine which it is. I cannot change that other appointment. It was one that was set specifically on the grounds of my being free on that particular day and there is nothing I can do about that one.

JUDGE HINKES: Let's wait until after lunch. We will see if you do have a problem. If we do, we will try to work out of it. There is no use taking it up at this time.

I will mark at least tentatively Thursday for Mr. Purvis and that would mean for next week we have only hearings scheduled at least tentatively for Tuesday and Thursday.

MR. CURNAN: That is correct, Your Honor.

JUDGE HINKES: We will see what Mr. Mathias can report to us after lunch. If there is nothing else, you may present your next witness.

MR. FALLS: Mr. Robert Havemeyer.

ROBERT G. HAVEMEYER was thereupon called as a witness for the Respondent Atlantic & Pacific and, having been first duly sworn, testified as follows:

XXXX

DIRECT EXAMINATION

By Mr. Falls:

Q Please state your name and address.

A Robert G. Havemeyer. I reside at 18 Prince Place, Stamford, Connecticut.

Q What is your occupation?

A I am a management consultant.

Q With what firm are you associated?

A I am associated with Case and Company, Inc.

Q How long have you been with that company?

A I have been with Case and Company since 1962. I was a founding partner in the firm. Prior to that I was with a predecessor firm, Stephenson, Jordan and Harrison, since ~~1963~~ 1953.

Q What was your position with Stephenson, Jordan and Harrison?

A I joined the firm as a staff consultant and gradually advanced to become a partner in the firm in 1960 and stayed as a partner until we formed Case and Company in 1962.

Q Will you describe for us the business of Case and Company?

A Case and Company is a general line management consulting firm, but it has certain special emphases, among which are the food industries. One of those specialties within the food industry is the dairy industry.

Q What was the business of Stephenson, Jordan and Harrison which I gather was the predecessor of Case and Company?

A The practice of Case and Company, much of the practice of Stephenson, Jordan and Harrison. Stephenson, Jordan and Harrison had been consulting to the dairy industry until the mid-50s, 1937, since that time. So, Stephenson, Jordan and Harrison, while being general management consultants, also had this long-time expertise in the dairy and food industries.

Q Can you identify some of Case and Company's clients and its predecessor in the dairy industry by name or category?

A First by category, we have consulted to dairy processors and distributors ranging in size from very small companies to some of the nationally known companies and large regional companies. We have consulted to dairy cooperatives, especially those who have processing and distribution operations. We have consulted to manufacturers of dairy processing equipment and to dairy packaging equipment.

We have consulted with several of the university agricultural research groups, especially as to questions concerning management, cost control, cost analysis, distribution operations which these agricultural research groups have undertaken under either Federal grants and under other types of grants, but most of which have been directed toward helping the dairy industry, processors and distributors do a better job in knowing their costs and planning their operations.

Our firm is the official accounting consultant to the Milk Industry Foundation and that foundation is the principal association of dairy processors, distributors in the United States.

Q Have you ever done any work for or in connection with state milk control agencies?

A Yes, our firm has consulted to several agencies and I have been personally involved in these. Among these are the State of

New York, prior to my joining the firm, the State of New Jersey, South Carolina, North Carolina, Virginia, Wisconsin. When I state milk commissions, the administrative organization changes a bit by state. For example, in Wisconsin it is the Department of Agriculture and not the State Milk Commission, but the regulatory agency concerned with the dairy industry in those states.

We have also submitted data in Montana, although our client was not the Montana Milk Commission. Our clients were dairy processors and distributors, but the data we submitted was then used by the commission in some of its pricing policies.

Q Can you describe any of the kinds of projects or kinds of tasks you have performed for these state milk control agencies or other bodies?

A Yes. It has been very largely, primarily in the field of cost analysis. Under their pricing statutes, generally speaking, these agencies in these states have the right to establish some kind of level on pricing and towards that goal they need information, information which generally is not available in the records of dairy processors and distributors.

So we have been commissioned by these various agencies from time to time to undertake cost studies on behalf of the commission or the Department of Agriculture, and these cost studies have been used by the agencies, and I think in all cases the results have been public.

Then, in addition, in Wisconsin and in Virginia we developed cost accounting manuals. These cost accounting manuals would be used by the staff of the commission for any future studies after our work terminated and the manual would also be available for dairy processors and distributors ot use for themselves in their own companies, because many of the dairy processors and distributors, particularly the smaller ones, do not have the knowledge to develop such a manual.

They do not feel they have the funds to retain an outside firm by ourselves to develop it for them exclusively, so the state milk commission on its own has, partly to help these dairy processors and distributors to understand their own work better, made our work public in the form of a standard cost accounting manual. So our work for these commissions has been primarily in the field of cost analysis, cost manuals and related material.

Q You testified Case and Company has served as consultant to the Milk Foundation, Inc.?

A Yes.

Q Do you have any personal role in connection with that particular function?

A Yes, I direct the work of that firm.

Q What is your background?

A I have a Bachelor and Master of Science Degree in Engineering from Columbia University.

Q Have you written any papers?

A Yes, I have written several. I am the co-author on cost control in the Industrial Engineering Handbook, the second edition, I think, published by McGraw-Hill, I believe. I co-authored a series of articles on management problems in the magazine called "Packaging." I have prepared an article in the baking industry on the subject of knowing the compensation of route man, how to determine the costs and how to use such cost information in questions of compensation. A talk which I gave before the New York Milk Dealers Association was made public and published as an article.

Q In addition to those writings, have you delivered any speeches or lectures on dairy industry costs and prices?

A Yes, I have. I have spoken at several state dairy association conventions. On behalf of the Milk Industry Foundation I conducted either seven or eight financial seminars around the country where dairy processors and distributors in the area could come and be taken through a series of a two- to three-day seminar on cost accounting for processing and distributing.

Again, most of these small companies do not know how to determine the cost by transaction. They cannot afford an outside firm so the Milk Foundation put on these seminars and I conducted them.

In addition, I have spoken at two annual conventions of the Milk Foundation on the general subject of costs and pricing.

I was the principal speaker at the only seminar devoted to pricing, public seminar devoted to public pricing in the dairy industry in Chicago. I was on for a day and a half and another speaker for about a day and a half, as I recall. I have spoken at two seminars conducted by the Milk Industry Foundation on the subject of data processing.

I have appeared before and delivered a talk to an annual convention of the International Association of Milk Control Agencies, which is the association of state milk commissions.

I am on the faculty -- this is beyond the dairy industry -- but I am on the faculty of the American Management Association, I lecutre on cost analysis, financial control, distribution analysis, subjects of that nature.

Q To what extent has your professional career been devoted to cost accounting in the dairy industry?

A Since 1955 very largely devoted to that industry.

Q Other than the reference to the American Management Association, are you associated with any other professional association?

A Yes, I am a member of the Institute of Management Consultants and I was one of the founding members of that organization.

Q Did you at our request make a study comparing Bowman Quotation, marked CX 50, of August 1965 for A&P with Borden Quotation on Milk and Dairy Products, marked CX-62?

A Yes, I have.

Q Have you prepared a chart at our request illustrating the results of that study?

A Yes, I have.

MR. FALLS: Your Honor, I would like to have marked as A&P Exhibit 100 a single-sheet exhibit entitled "Comparison of Bowman, CX 50, and Borden, CX-62 (Borden Zone 1).

XXX (The document referred to was marked A&P Exhibit No. 100 for identification.)

MR. MATHIAS: Could we have a few minutes' break to xerox a few copies of the revised papers we received yesterday afternoon. I would like my accounting experts to be able to follow this and we have only the one copy.

JUDGE HUNKES: Yes, I think we had better do that. This is a revised 100?

MR. MATHIAS: They are underlying documents for 100. I don't know whether 100 itself has been revised or not.

MR. FALLS: No, it has not. We have no objection to that.

JUDGE HINKES: We will take a short recess so you can xerox those copies.

XXXX (Whereupon, a brief recess was taken.)

JUDGE HINKES: You may proceed, Mr. Falls.

By Mr. Falls:

Q Let me hand you the document which has been marked RAPX

100 and ask you if that is a copy of the chart which you say you had prepared where you compared the Bowman and Borden quotes.

A Yes, it is.

Q What underlying documents did you examine in order to secure the data necessary for these calculations?

A We relied upon CX 62, CX 50, CX 36, CX 42, CX 56. We also relied upon page 7 of a procedure outline prepared by the Borden Company, which I believe is A&P Exhibit 66 in this hearing. We relied upon a Borden internal document for its Region 7, which I think is A&P Exhibit 73, and we relied upon Borden summary billings to A&P stores in May and September 1965.

Q Mr. Havemeyer, and let me point out, Your Honor, we now have up on the easel a copy which I believe to be an identical copy of RAPX Exhibit 100. The title of A&P Exhibit 100 indicates it relates to Borden's Zone 1, is that correct?

A That is correct.

Q That is a comparison of the quotes as they relate to Borden Zone 1.

A Yes, sir.

Q Approximately what percentage of A&P sales were in Zone 1?

A Approximately 75 percent.

Q Turning first to the figure of $2,521,294.96, which appears at the top of the first column on A&P Exhibit 100, would you explain what that ~~exhibit~~ represents and perhaps at this

figure

point you could use the large copy of the exhibit mounted on the easel.

A This figure represents the price A&P would have paid Borden under the prices quoted in CX 62, based upon the annual quantities listed in CX 62 in Borden's Zone 1 for homogenized milk in paper containers in three sizes -- quarts, half-gallons and gallons with an adjustment, an adjustment being an adjustment in the price of raw milk.

Q Would you explain what that adjustment was made and how it was made?

A In Borden's quotation the prices quoted in CX 62 were based upon a raw milk price of $4.29 per hundredweight. Borden included a provision to change the quoted price depending upon changes in the price of the raw milk. We used the methodology in the table which is laid out in CX 62.

Q To adjust for what raw milk price as opposed to $4.29?

A A price of $4.32 because the Bowman price was based upon a raw milk price of $4.32. To make a valid comparison between two quotations, we made use of this adjustment which was a feature of the Borden quotation.

Q If I understand you, the Borden price as adjusted was based on $4.32 per hundredweight, as was the Bowman price?

A That's right.

Q From what source was the annual quantities of A&P's purchases determined in connection with the calculation of this figure of $2,521,294.93?

A These annual quantities for Borden Zone 1 are laid out and stated specifically in CX 62 for Zone 1.

Q Again referring to the raw milk price adjustment of, to make a conversion from $4.29 to $4.32, you mentioned that this was taken from the Borden quotation. Can you identify the particular schedule involved? You can go back to your seat and locate the exhibit, if you wish.

A In CX 62, pages N and O, the change is shown in the price for a quart, half-gallon and gallon package of milk for each penny change in the hundredweight price.

Q So you directly applied that schedule in making the adjustment you have described?

A That's right.

Q Mr. Havemeyer, let me direct your attention to the second figure in the first column, which is $25,345.75. Let me ask you what that represents.

A This represents an adjustment for a value of one-tenth percent in butterfat being the butterfat level in the homogenized milk. The reason for this is the Borden quotation was based upon a butterfat content of 3.4 percent and Bowman's quotation was based upon a butterfat content of 3.5 percent, and Borden's CX 62 showed how such an adjustment would be made.

Q Again you used the methodology described in the Borden Exhibit CX 62 in making that adjustment?

A That's right.

Q Could you identify where that schedule is to be found?

A CX 62, page X, entitled "Formula Price for Raw Milk."

Q So that the butterfat adjustment you just described amounted to $25,845.75?

A That is correct.

Q Do I understand the following figure, $2,546,340.71, represents the Borden quoted price on the homogenized milk in paper containers after both the raw milk and the butterfat adjustment?

A That's right.

Q Could you next turn to the figure of $2,514,530.13, which is the first figure in the second column, and tell us what that represents and how it was determined?

A That represents the price that the A&P Company would have paid to Bowman had it accepted Bowman's prices as laid in CX 50. That is based upon the ---

Q This is for the same products?

A For the same products of quarts, half-gallons and gallons of homogenized milk in paper containers using the same quantities specified in Borden's CX 62, this includes an adjustment.

Q Would you tell us generally the nature of that adjustment?

A The two quotations were presented in five geographic areas called zones and they did not coincide. We made an adjustment to put Borden's Zone 1 on a comparable jeographic area with

Bowman's quotation. So, the prices would reflect the same areas.

Q Have you at our request prepared a series of charts to illustrate the geographical difference to which you have just referred?

A Yes, charts like this have been prepared.

MR. FALLS: I would like to have these charts marked A&P Exhibit 101-A, B and C.

XXXX (The documents referred to were marked A&P Exhibits 101-A through 101-C for identification.)

By Mr. Falls:

Q Mr. Havemeyer, we have put up on the easel here the document which has been marked as A&P Exhibit 101-A. This is a chart you prepared, is that right?

A That's right.

Q Would you explain what it shows?

A This shows the location of towns in which A&P had stores or at least those towns which were identified in both the Bowman and Borden quotations as to where A&P had stores to be served under the private label bids. It is coded first in color with Bowman being red and Borden being blue. It is further coded as to the shape of the symbol to indicate the frequency of delivery which was indicated in the quotations.

Simply, in the case of Bowman as in the case of Borden a round circle, solid circle, indicates that six-times-per-week delivery was anticipated.

A solid square, either red or blue, indicates that three-times-per-week delivery was anticipated.

A square which is white in the center and that is blue indicates Borden anticipation of five-times-per-week delivery. Although Borden had made notations about four-times-per-week delivery in its bid, it actually identified no stores where there were to be four-times-per-week delivery, so you will not find there any of the blue squares which are half-shaded and half-white.

Q Let's turn to A&P Exhibit 101-B and let me ask you to explain that one, Mr. Havemeyer.

A This is a photograph of the same map which you have previously looked at with an overlay on it; that is, all the symbols, dots and squares are identical to those seen on 101-A.

The red shaded areas indicate the zones as outlined in the Bowman quotation. The heavily shaded area, the solid shaded area, indicates it is Chicago metropolitan area.

Q Is that Zone 1 or Area1?

A It is Area 1 as indicated here by my pointer. Its so-called Area 2 could be described as Northwestern Illinois. Its Area 3, indicated by the slanted lines and as indicated here, could be described as North Central Illinois.

It called Area 4 with vertical stripes was its portion of Indiana and, finally, its Area 5 over on the West extends over into Iowa, but also includes parts of Illinois. So, these are the five areas or zones which have been specified in the Bowman quotation.

Q Will you now turn to A&P Exhibit 101-C and explain what that shows?

A A&P Exhibit 101-C is a picture of the original map with the same indications of town locations, with the same red shaded areas as shown on 101-B and with a second overlay of blue representing the zones which were described in Borden's quotation, CX 62. This gets a little more difficult to follow, but I will outline the areas. I am now talking about the blue outlined areas.

Borden's Zone 1 is that which has the small dots in it and you could generally describe it as the Chicago metropolitan area, but also including a section of the northwestern portion of Indiana. I will trace its outline with my pointer here. This goes over into Indiana, up to the lake and over to there.

Borden's Zone 2 was another part of Indiana, and I will trace that with my pointer.

Borden's Zone 3 is over here. It is this unusually shaped area coming over here as far West as Rockford, I believe it is, and down into Joliet.

Its Zone 4 was a peculiarly shaped area including a section of Indiana, North Central and a good portion of Northwestern Illinois up to the Wisconsin line.

2500

Zone 5 is over on the West including portions of Iowa and Illinois.

As we have been talking so far, we are focussing on Zone 1 Borden, which is generally its Chicago area and the northwestern portion of Indiana.

LH fols

Q If I understand you, Mr. Havemeyer, the particular area that created the necessity for the geographical adjustment you have referred to was this small piece of Borden Zone 1 that extends over into northwest Indiana?

A That is right.

Q In the part that we have just pointed to, this little piece of Borden zone that sticks over into Indiana, in what Bowman zone did that fall?

A That is in -- if you would refer to Exhibit 101, that falls in Bowman Zone 4, its Indiana zone.

Q Did Bowman quote to A and P a different price for its Zone 4 and its Zone 1?

A Yes, it did.

Q Is this the reason why some adjustment was necessary?

A That is right.

Q Would you explain, Mr. Havemeyer, in a general way at least, how that adjustment was made -- that is, the geographic adjustment with respect to this little piece over in northwest Indiana?

First, how many A and P stores were located in that particular segment?

A There were 15 A and P stores in this small segment in northwestern Indiana, and there were also 15 A and P stores in this Borden Zone 2 in Indiana.

Q How many A and P stores were there in all of Borden's

Zone 1?

A Something over 100.

Knowing that there 15 stores in that small section of northwestern Indiana as well as 15 stores in its Indiana Zone 2, we assume that the amount of fluid milk product as quoted under this bid would be about the same in both of those zones. On the basis of that, we made an adjustment.

Q So you determined then the anticipated volume of sales of these 15 stores in the segment of northwest Indiana we have talked about?

A That is right.

Q You applied to that volume of sales the Bowman Zone 4 price which was the applicable price?

A That is right.

Q I think perhaps we can go back, Mr. Havemeyer, to A and P Exhibit 100, unless the Court would like some further explanation on the point at this stage.

JUDGE HINKES: No; you may continue.

By Mr. Falls:

Q If I understand your testimony, Mr. Havemeyer, the figure of $2,514,530.13 represents the Bowman quote for the ~~annual~~ annual quantity of quarts, half-gallons, and gallons of homogenized milk in paper containers after having made the geographical adjustment which you have just described?

A That is right.

Q Would you tell us what $32,110.58 represents, which is the second figure in the far right-hand column on A and P Exhibit 100?

A That is the difference in price under the Bowman and Borden quotations modified as described in the adjustments we have just talked about for raw-milk price, butterfat adjustment, and geographic adjustment for the homogenized milk in paper containers, in quarts, half-gallons, and gallon sizes, and the fact that it is a positive number means that the A and P Company would have paid $32,110.58 less had it accepted the Bowman bid than had it accepted the Borden bid.

Q For these products?

A For these products.

Q Let me direct your attention next, Mr. Havemeyer, to the figure $697,926.87, which is the fourth figure in the first column on A and P Exhibit 100, and ask you what that represents.

A This represents the price that the A and P Company would have paid to Borden for homogenized milk in glass gallon containers had it accepted the Borden quotation based upon quantities laid out in CX-56 and based upon billing prices which Borden was actually charging to A and P in the Chicago and suburbs area. The reason for this is that in CX-53 that container was withdrawn from the bid.

Q Did you make the same raw-milk price adjustment in calculating that that you did in connection with the milk in paper containers or was that not necessary?

A Excuse me just a minute.

Yes, the same adjustment was made for the raw milk prices.

Q What does the number of $6,222.45 represent?

A That represents, as for the milk in paper containers, the value of an additional tenth percent butterfat content to bring the homogenized milk in glass containers up to the same level of butterfat content as Bowman would have had in its quotation.

Q What does the $592,880.08 represent?

A This is the price that A and P would have paid to the Bowman Company under the price laid out in the Bowman quotation.

Q That again includes the geographical adjustment that you described before?

A Yes, it does.

Q What does the figure of $111,288.44 represent?

A That is the difference between the figure for Borden of $704,169.32 and the figure for the Bowman quotation of $592,880.88. The fact that it is a positive figure means that A and P would have paid Bowman $111,288.44 less than if it had accepted the Borden quotation.

Q Let's turn to the next row of figures, beginning with $3,250,810.03. Go along there and explain these figures.

A $3,250,810.13 is the sum of the figure for just the homogenized milk in paper containers of $2,546.640.71 and the figure for homogenized milk in glass gallon containers of

$704,169.32.

Similarly, under the Bowman column, the figure of $3,107,411.01 is the sum of the Bowman quotation for homogenized milk in paper containers of $2,514,530.13 and $592,880.88, the latter representing the price A and P would have paid Bowman Company for milk in glass gallon containers.

These two figures which are on the line "Total cost of homogenized milk adjusted to 3 and a half percent butterfat" have their difference indicated in the right-hand column of $143,399.02. The fact that it is a positive figure indicates that A and P would have paid the Bowman Company that much less had it accepted Bowman's quote than it would have paid the Borden Company.

Q This applies to all homogenized milk, whether in paper or glass?

A That is right.

Q Would you next turn your attention to the next series of items opposite the heading 8 "Other dairy items on which Borden offered private label"?

A Yes. In CX-62, Borden offered eight other items beyond the homogenized milk group in private label. When we went through the raw-milk price adjustment as described before, going from $4.19 per hundredweight to $4.32 per hundredweight and extending that modified price by the quantity set out in Borden's CX-62, we arrived at the figure of $1,063,967.48.

Similarly, when we applied Bowman's prices to those products and made the geographic adjustment that we described before, then we had, for Bowman, $1,062,157.59. Their difference is $18,190.11. The fact that it is indicated as a negative number means that A and P would have paid Bowman $18,190.11 more if it had accepted the Bowman quotation than had it accepted Borden's quotation.

Q Again, would you go through the same procedure, Mr. Havemeyer -- let me ask you one question. On that particular comparison, was any butterfat adjustment necessary?

A No, there was no adjustment necessary.

Q Going to the next line, which is "Total 11 items on which Borden offered private label, adjusted to 3 point 5 percent butterfat," explain what that shows.

A This is the sum of two figures. In the case of Borden, it is the sum of $2,546,640.71, which is the price for homogenized milk in paper containers, three different sizes, and for the eight other items on which Borden offered the products in private label of $1,063,967.48.

The corresponding figures were added in the Bowman column to give us a sum of $3,596,687.72. The difference between the two figures on that line is $13,920.47. The fact that it is a positive figure means that A and P would have paid Bowman $13,920.47 less if it had accepted the Bowman quotation than if it had accepted the Borden quotation.

Q This is a comparison of all of the 11 items which Borden offered in private label?

A That is right.

Q And includes no others?

A That is right.

Q Would you direct your attention next to the following line figures appearing opposite the heading "10 additional items offered by Bowman ~~or~~ in private ~~label and by Borden and Borden~~ or Bowan label and by Borden in Borden label only"?

A Yes, sir. As indicated by the footnote, these 10 items include sour cream in pints and half-pints, pints of sour half-and-half, and so forth, expressly set out in Footnote 3. They were not offered by Borden in private label but only in the Borden label.

Borden did not have an annual estimate of the quantity of these items which would be purchased by A and P. Therefore, we do some proportioning to determine approximately how much of those 10 additional items would be purchased based upon some billing summaries.

When we took the actual prices which Borden had been charging A and P and multiplied by the quantities which I just mentioned, we came up with a price of $692,850.94.

When we applied Bowman's prices to the corresponding products -- and I use "corresponding" rather than "identical" because they were not identical; the Bowman would call them one way and Borden might call them another name, but as far as we could tell, they were the corresponding product -- then we had a figure of $597,160.62, and that figure also includes a geographic adjustment I just described.

Finally on that line, a figure of $95,690.32 represents the difference between the Bowman and Borden quotations for those 10 additional items, and the fact that it is a positive number means that A and P would have paid Bowman $95,690.32 less if it had accepted the Bowman quotation than if it had accepted the Borden quotation.

Q You mentioned this question of annual quantities. I gather that the annual quantities for the preceding products were obtained from the Borden bids on private label where those annual quantities were set out?

A Yes, sir.

Q Since these 10 products were not included in those bids, there was no such convenient source of the annual quantities?

A That is right.

Q So you had to derive those from Borden's actual billings?

A That is right.

Q Would you turn, then, to the final line, in which the figures appearing opposite the total 22 fluid milk items --

A There is a figure under the Borden column of $5,007,623.45. This is the sum of three figures. It is the price for all homogenized milk items of $3,250,810.03 and the eight other dairy items on which Borden offered private label and, finally, these 10 additional items which Borden offered only in Borden label.

When we add the corresponding figures for Bowman, we find, in the Bowman column, a figure of $4,786,729.22, and the difference between those two totals in those two columns is $22[illegible],899.23. The fact that it is a positive figure means that A and P would have paid Bowman that much less money for these 22 items if it had accepted the Bowman quote than if it had accepted the Borden quotation.

Q So this is the difference in the quotes for all 22 items if A and P had taken all of them from Bowman instead of all of them from Borden?

A That is right.

Q Mr. Havemeyer, were you able to compare in the same way the Borden and Bowman quotes for all zones? That is, this is a comparison with respect to Zone 1. Were you able to make the same comparison for all zones?

A No, we were not able to do that.

Q Why was that? Should I put the maps back up?

A Yes, I think that would be helpful.

If I can direct your attention to this map, I want to emphasize the point that there is a lack of coincidence in these zones or in the boundaries. There is considerable overlap and there are pockets of overlap, if you will, where it might be Borden Zone 3 and Bowman Zone 2.

To be specific, for example, over here in a portion of central Illinois, north central Illinois, there is the Borden Zone Number 5, as indicated by this crosshatching. As indicated by the red crosshatching going in the other direction, it is Bowman's Area 3.

Now, just as there was an area of overlapping zones there and different shapes and sizes of overlapping areas or pocket of overlap in those other zones, gave us a problem. We did not have in any of the quotations specific quantities of each of the milk items, the 11 items, which would be sold in those zones or those subzones. We just did not know how much of these dairy products would be sold here in these queerly shaped zones and all these zones of overlap.

As you can see, there are quite a few zones of overlap and peculiarly shaped areas, no regularity to it, and we simply did not have quotations telling us what the quantities would be in the areas of overlap, as I call them.

Secondly, there was, in the Bowman quotation, a somewhat vague reference to an adjustment on raw-milk price, and I read from CX-50 on page 4: "In the event that stores are served in areas where there is no Federal milk order or where the superpool price is not effective, we will adjust the quoted prices in that area."

Finally, we did not have available to us, although we tried to get it, information in other areas beyond Chicago and suburbs which corresponded to the billing summaries which we were able to use in the case of prices for glass gallon containers and in the case of both prices and quantities which we used with respect to these 10 additional items offered by Borden in Borden label only. The information could not be developed beyond the billing summaries available for the Chicago and suburbs areas.

So, for these three reasons, we could not make this kind of analysis of this type in the other zones.

MR. FALLS: We are nearly finished with this exhibit. Could we have about a three-minute recess so I can see if there is anything else I have on this?

JUDGE HINKES: Yes. We will be in recess for a few minutes.

(A short recess was taken.)

JUDGE HINKES: Mr. Falls.

MR. FALLS: I have just two more questions.

By Mr. Falls:

Q I direct your attention to the next to the last heading from the bottom on A and P Exhibit 100, which reads: "10 additional items offered by Bowman in private or Bowman label and by Borden in Borden label only." Do you have any comment with respect to the accuracy of that heading?

A Yes; the heading is slightly inaccurate, based upon my reading of Mr. Frank Cannon's testimony which I read in the last few days. As you can imagine, this was prepared some time prior to that. In Mr. Cannon's testimony, he said Bowman offered a few items in private label or Bowman label but that on the small-volume items they were going to be offered only in the Bowman label.

However, he also said that the price would remain the same, where there was the option, whether they took it in Bowman or private label.

So the heading is slightly inaccurate in that Bowman did not offer low-volume items in the private label, but the price did not change.

Q But the price was not altered?

A The price is not altered.

Q I believe, although I could be in error, that in your testimony with respect to the comparison of the Borden and Bowman quotes on glass gallons of homogenized milk -- I believe you said a raw-milk price adjustment of the kind you describe was made in connection with that comparison. Is that correct?

A If I said that, that was wrong. There was no adjustment necessary for the raw-milk price on glass gallon containers, the reason being that this item was not quoted in CX-52 and, therefore, did not have the price adjustment to go along with it -- more specifically, the price which we have used to develop the figure of $597,926.87 based upon the actual price charged by Borden to A and P in the Chicago and suburbs area during 1965.

Q In September of 1965?

A. September of 1965, yes, sir.

Q That price was based on a raw-milk price of $4.32 per hundredweight?

A That is right.

MR. FALLS: I would like to offer into evidence A and P Exhibits 101-A, B, and C.

MR. MATHIAS: Your Honor, may I have some voir dire?

JUDGE HINKES: Very well.

XXX VOIR DIRE

By Mr. Mathias:

Q Mr. Havemeyer, there were certain underlying computations made by you in connection with the preparation of Respondent A and P Exhibit 100 for identification, were there not, sir?

A Yes.

MR. FALLS: Let me have marked as A and P Exhibit 102 a multipage document which is entitled "Location of Indiana A and P Stores by Bowman and Borden Pricing Areas."

XXX (The document referred to was marked Respondent A and P's Exhibit 102 for identification.)

MR. FALLS: We will mark as A and P Exhibit 103 a document consisting of four pages entitled, on the first page, "Price Adjustment Demonstration - Zone 1, Adjustment Prices (CX-62) from Raw Milk Price of $4.29 Per Cwt. to Raw Milk Price

A That is right. They were a superior figure. They were an actual quotation amount.

Q What was your next step after you had obtained these percentage figures?

A I now refer you to Exhibit 102-T. I refer you to Footnote 1, which says: "See II-3. That is the one we just left, which is 102-P. You will note, in the first column of data — again, we have listed the products as they have been listed in the previous subparts of 102. In the first column of data, we have transferred the percentage of percentages shown on 102-P.

Q That is under the heading "Projection Factor"?

A That is right.

The second column, "Points per Unit," is taken from — directly from a Borden document, which is the number of points per unit. We have postings from CX-62 as to the number of units in Zone for each of the private-label items — for example, the homogenized paper gallon, 373,327, and so on down the list. Multiplying that by four, it would give us 3,093,308.

Q That would be the number of points of paper gallons?

A Yes.

Now, we have from Borden's — we have data from Borden's Zone 2, and that is posted in Column 6.

Q These are the stores over in the South Bend area primarily?

a reasonable extension of time.

MR. CURNIN: May we have one week to the following Monday?

JUDGE HINKES: The 8th of April?

MR. CURNIN: The 8th of April.

JUDGE HINKES: I think that would be appropriate. I will enter the order here and now on the record so that no further action need be taken by me.

MR. CURNIN: Thank you, Your Honor.

JUDGE HINKES: The return on the subpoena directed to Respondent A & P, a subpoena which was issued on the 20th of March and is returnable on the 28th day of April, the response to that subpoena, at the request of counsel for A & P, may be made no later than April 8th. And by that, I refer to any motion to limit or quash or any other such limitation upon the subpoena may be made no later than April 8th. The return date remains the same.

Is there anything else that should be taken up at this time, then?

Yes, Mr. Schaefer?

MR. SCHAEFER: As I understood it, Your Honor, the next witness relating to Count 3 will be on Friday morning; is that correct?

MR. CURNIN: That is correct.

JUDGE HINKES: That is right.

MR. MATHIAS: Your Honor, we were discussing earlier the question of when we could resume. It is quite a bit later now. Plus I have found out by telephone that the documents will be ready at about a quarter to 2:00. I would suggest we make a 2:00 o'clock resumption time.

MR. CURNIN: We have no objection.

JUDGE HINKES: If it is unavoidable, I see no alternative.

MR. MATHIAS: We expected a lot more questioning of Mr. O'Connor. That is why we took an opportunity to have extra copies of those made. One document was cut out of Mr. O'Connor's questioning. So that limited things a lot more than we had expected.

JUDGE HINKES: Very well. We will recess at this time and resume in this room at 2:00 o'clock.

(Whereupon, at 12:00 p.m., the hearing recessed, to resume at 2:00 p.m. the same day.)

- - -

ROBERT G. HAVEMEYER resumed the stand and testified further as follows:

DIRECT EXAMINATION (continued)

By Mr. Falls:

Q Do you have before you or can you put before you CX Exhibit 50?

A Yes, I can.

Q Let me direct your attention to the second paragraph. Mr. Havemeyer, let me direct your attention to the first sentence of the second paragraph on CX-50, which says: "These Bowman quotations were developed by our accountant on a total estimated volume of approximately $1 million per month, 26 delivery days, using Chicago list prices."

Let me ask you, Mr. Havemeyer, whether you, at our request, made some analysis to determine whether A and P's annual volume of purchases at Bowman Chicago list prices would have been on the order of $1 million per month.

A Yes, I have.

Q What was your conclusion?

A That the dollar volume ~~has~~ was in the neighborhood of $1 million per month.

MR. FALLS: I would like to have marked for identification an additional exhibit consisting of a number of pages, the first of which is entitled "Estimated Average Monthly List Price Value of A and P Milk Line Purchased from Borden in Area

By Mr. Falls:

Q Let me ask you to look, Mr. Havemeyer, at A and P Exhibit 109 and ask you whether that is something that was prepared by you or under your supervision?

A. Yes, it was.

Q What is it designed to show?

A. This is designed to show a resulting figure and a conclusion from that figure of 10.62 percent which is the profit percentage of Borden's proposed prices on 11 profit label items as expressed in CX-62 proposal of 9-21-65.

MR. MATHIAS: Your Honor, before we proceed with this line of questioning, I would like a statement of relevance of this exhibit and the line of questioning.

JUDGE HINKES: Perhaps we should consider that, Mr. Falls.

MR. FALLS: We think it is quite relevant to determine whether the bid which A and P received from Borden was a profitable bid. There has been testomony as to the extent to which Borden had to cut its margin, had to push down its prices to deal with A and P and to get the A and P business.

We think it may relate also, or at least it would be relevant to the question, of the likelihood that this was discriminatory as against the other purchasers, the fact that it was a profitable bid, that it may have been in line with the profit Borden was generally making on this business would suggest that it was not out of line with its pricing in other areas.

We think it is also relevant in determining A and P's good faith, whether A and P properly regarded this as a lawful bid, the fact that it was in fact a profitable bid, it seems to us, is relevant to show that A and P properly believed it to be a legal, profitable bid.

JUDGE HINKES: By legal and profitable, you mean A and P was not under the impression that Borden was losing mone money?

MR. FALLS: Was losing money on the bid, was cutting itself down to get the A and P business down to a minimal profit and it was making its profit elsewhere.

MR. MATHIAS: Did you say A and P counsel contended that A and P had knowledge of any of the figures in this exhibit or any underlying exhibits?

MR. FALLS: We don't contend that A and P had knowledge of Mr. Havemeyer's analysis, because it was not available. I think our contentions on exactly what knowledge A and P had about Borden's intentions or approach to the bid will await our briefing on the subject.

MR. MATHIAS: Your Honor, I really don't quite understand the relevancy of this to the Robinson-Patman portions of this case, which are the only portions for which it is being offered. In view of the fact that there is no comparison in this with costs to other customers, there is no way to determine from Mr. Havemeyer's objections to this exhibit whether or not the price to A and P could be cost-justified as compared to prices to other competitors.

MR. FALLS: We will come to that, Mr. Mathias, in later exhibits.

JUDGE HINKES: Go ahead with this exhibit in the meantime.

MR. FALLS: Thank you, your Honor.

By Mr. Falls:

Q Now, Mr. Havemeyer, can you identify for us the underlying source documents that were used in the study which resulted in this exhibit?

MR. FALLS: I may say, your Honor, we have prepared a memorandum which sets out those source documents. I think the most convenient way to do this is in terms of having the witness identify the exhibit, although I confess we did not list this on a witness list as an exhibit. I could ask him to read the list into the record as his testimony.

MR. MATHIAS: Complaint counsel have no objection to underlying documents being offered in.

MR. FALLS: Let me have this three-page memorandum, source documents used in preparation of charts analyzing Borden's profit potential on its September 21, 1965 bid to A and P, marked A and P Exhibit 110.

(The document referred to was marked Respondent A and P's Exhibit 110 for identification.)

By Mr. Falls:

Q Let me show you a document marked A and P Exhibit 110 and ask you if that is, in fact, a listing of the source documents that resulted in the preparation of A and P Exhibit 109.

A Yes, it is.

Q Turning back to A and P Exhibit 109, would you explain that chart to us? I note again there has been a larger version of it mounted on the easel.

A There are a few key columns of data here from which all other data on the chart are derived. Of course, as can be noticed, 11 private-label items are listed. I refer you to Column B, which is headed "Sum of All Costs Through Delivery." These were costs as determined by Caso and Company for each of the 11 private-label items and posted in that column and which will be explained in some detail later.

The figures in Column C are directly from A and P's private-label quotation of 9-21-65.

We will now use those two columns of data and the points which are unit in Column A to derive the figures in Columns D and E. As indicated by the footnotes, Column D is Columb B divided by Column A.

More specifically referring to the homogenized paper gallon, the figure of dollar sign point 573253 divided by four is equal to the figure in Column D of dollar sign point 143313 and so on down the list of 11 items. That, then, tells us the cost per point.

Now I refer you to Column E, the price per point, which, as the footnote shows, is Column C divided by Column A. So, in the case of the homogenized paper gallon of figure of dollar sign point 6248 in Column C divided by four is equal to the price per point in Column E, dollar sign point 1562.

Column F is the margin per point, the difference between price and cost. As the footnote shows, it is Column E less Column D. So if we subtract Column D, dollar sign point 143313, dollar sign point 1562, we have a margin per point of dollar sign point 012887. This arithmetic has been done for each of the 11 private-label items.

We have also derived, in Column G, from CX-62, the relative volume of each of these items to the total. For example, the homogenized paper gallon is 17 point 03 percent of the total points and so on down the list of 11 items.

We are now going to get a weighted margin per point, weighting the individual margins in Column F by the proportion of those items to the total in Column G. If you multiply the figure in Column F for the homogenized paper gallon by the percentage in Column G, you will have the weighted margin per point for each of those items, which, in the case of homogenize paper gallon is dollar sign point 002195.

Again that has been done for each of the 11 private-label items. They have been totaled to the line called total of dollar sign point 02266.

The final figure there on the "Total" line of dollar sign point 02266 is the weighted average margin per point for these 11 private-label items based upon the prices quoted in CX-62 and based upon the cost analysis as determined by Case and Company for all costs through delivery.

There is finally one additional cost, which is not proper to determine specifically by each item but it would be determined on the average per point, in this case, the indirect administrative and marketing costs not included in unit cost calculations of dollar sign point 00530.

When we subtract the latter figure from the weighted average margin per point, we have a profit per point, dollar sign point 01736. Then we divided that figure by the weighted average price per point, and the weighted price per point was determined in a similar fashion; that is, we have the prices, the price per point in Column B, for each of the 11 items. We have the percent that each is to the total in terms of volume, and we did the same kind of multiplication there as we had done in the case of determining the weighted margin per point.

So we have a weighted average price per point dollar sign point 1635; dividing the profit per point, dollar sign point 01736, by the price per point of dollar sign point 01635, we have a profit percentage of 10 point 62 percent.

Q That is a profit as percentage of sales?

A That is correct.

Q Is it a fact the great bulk of your analysis and study leading to the conclusion represented by this exhibit relates to the determination of the costs set out in Column B and at the bottom of the page opposite the heading "Indirect administrative and marketing costs not included in the unit-cost calculations"?

A That is true.

Q The others are fairly easy to calculate, is that true?

A Yes.

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MR. FALLS: I would like to have marked as A&P Exhibit No. 111 for identification a chart entitled, "Profit/Loss Evaluation of Borden's Private Label Bid."

(The document referred to was marked Respondent A&P's Exhibit 111 for identification.)

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MR. FALLS: Your Honor, we are going to be going from exhibit to exhibit, so whatever your pleasure is for lunch we can break after any of these exhibits.

JUDGE HINKES: This might be an appropriate time. Do you wish to resume at 1:30?

MR. MATHIAS: I think 1:30 is fine. I don't think we would gain that much by coming back earlier.

JUDGE HINKES: Very well, we will resume in this room at 1:30.

(Whereupon, at 12:05 p.m., the hearing was recessed, to be reconvened at 1:30 p.m. the same day.)

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AFTERNOON SESSION

1:30 p.m.

JUDGE HINKES: On the record.

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ROBERT G. HAVEMEYER, the witness on the stand at time of recess, resumed the stand and testified as follows:

DIRECT EXAMINATION (continued)

By Mr. Falls:

Q I think we had reached the point where we were asking Mr. Havemeyer to explain Exhibit 111 which is up on the easel.

A You may recall that an A&P Exhibit 109, Column B, sum of all costs through delivery.

The next few exhibits will now refer to segments of that cost.

The first chart which is now A&P Exhibit 111 is an overall flow chart to show the various elements or segments that go into the chart we have been looking at.

There are material costs, processing costs, trailer loading costs, hauling costs which is to get it from the processing plant to the redistribution point, truck loading which is loading off the local delivery costs, the delivery costs to the store.

These six items constitute that Column B which is all costs through delivery, total cost per item.

You have already seen the results of that on the previous exhibit.

The net price per item shown on that exhibit, those two when expressed so much per point gave us the weighted margin per point. When we subtracted from that margin the indirect and administrative costs we came to the profit or loss per point.

This shows in a graphical, pictorial way the several elements of cost which went into that Column B, all costs for delivery and the rest of the chart shows the remaining arithmetic on price, price less cost with margin, weighted margin with these costs with a profit or loss.

Q The trailer loading cost which is the third box from the top is the trailer loading cost at the processing point?

A That is correct.

Q And the hauling point would be to O'Hare, for example?

A That is right. The raw milk that comes to the processing plant -- you have the material costs and processing costs and the processing plant. They load trailers at the processing plant to take the bottled merchandise to a local redistribution point such as O'Hare so that trailer is loaded at the plant. Then the material is hauled in trailers to the redistribution point such as O'Hare and it is unloaded into the O'Hare cooler and then the local delivery trucks are loaded at the redistribution point.

Then finally it is delivered from the redistribution point such as O'Hare to the store.

So there is the total flow from raw milk through to the store. These are the elements or segments of that cost which we will be looking into in more detail.

Q It was your task to apply them on a per unit and per point basis?

A That is right.

MR. FALL: I would like to have marked as A&P 112, entitled, "Direct Material Cost/Item."

(The document referred to was marked Respondent

XXXX A&P Exhibit 112 for identification.)

By Mr. Falls:

Q You have before you, Mr. Havemeyer, a copy of A&P Exhibit 112 which is also a chart you prepared; is that correct?

A That is correct.

Q Would you carry your discussion forward on the basis of that chart?

A In this exhibit we are now going to concern ourselves with the details of direct material cost which is one of the six major areas of cost which went into the total cost per item.

In the material cost we have three segments -- raw product cost, ingredients, and container.

As indicated by this exhibit those three elements of cost come down into the direct material cost per item. The word "item" herenow in all this discussion will mean a particular product and package -- the homogenized milk in a paper package,

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in a half gallon package, in a quart package and so on.

This means 11 private label items.

This flow chart indicates the source of the underlying data which we used -- the cost of the raw product coming from Commission Exhibit 54-B.

~~Similar to~~ Similarly the cost of the ingredients going into an item came from CX Exhibit 54-B and the cost of the container came from Government Exhibit 4 which incidentally is a study done by Haskins and Sells of the Borden's plant in Milwaukie.

Q The other document you referred to, Commission Exhibit 54-B, is also an internal Borden record; is it not?

A It is an internal Borden document.

MR. FALLS: Next we would like to have marked as A&P Exhibit 113 for identification a chart entitled, "Summary of Direct Material Cost for Private Label Items."

XXX (The document referred to was marked Respondent A&P Exhibit 113 for identification.)

By Mr. Falls:

Q Exhibit 113 is also a table which you prepared; is it not?

A That is correct.

Q Would you explain that, please?

A This shows the data which I have explained in the pictorial form on A&P Exhibit 112. You will find each of the 11 private label items listed and you will find the three elements of cost which go into the direct material cost -- the raw product cost as indicated for each item, the ingredients cost as indicated for each item, and the container cost as indicated for each item. And those three columns add across to the total in the right-hand column.

For example, the homogenized quart of milk in paper container has a cost of $.094546 plus the ingredient cost of $.000030 plus the container cost of $.016060 plus totalling $.110636.

Q What kinds of things would be included in ingredients cost?

A Vitamin additives. In the case of chocolate there would be flavoring in there, butter milk starter and so forth.

MR. FALLS: I would now like to have marked as A&P Exhibit 114 the chart entitled, "Attachment II Processing Cost per Item."

(The document referred to was marked Respondent A&P Exhibit 114 for identification.)

XXXXX

By Mr. Falls:

Q Exhibit 114 is also prepared by you; is it not?

A That is right.

Q Would you explain that?

A Now we are going to the elements or the processing cost for each of these items. This is more detailed and somewhat more complex than the cost of the direct material.

In this situation, you have essentially all the costs of operating your plant -- labor cost, ownership costs, rental costs, equipment costs, supplies, utilities and so on.

In this situation and in this particular study, we worked with three groups of costs individually. We had available to us the so-called Milwaukie unit cost. This was a cost study conducted for Borden of its modernized Milwaukie plant by the professional firm of Haskins and Sells.

MR. MATHIAS: Your Honor, I am going to move to strike the term "modernized Milwaukie Plant." There has been no testimony as to the state of Borden's Milwaukie plant, and this witness has not shown that he was qualified to categorize or describe the Milwaukie plant.

JUDGE HINKES: I must sustain the objection.

By Mr. Falls:

Q Do you have any knowledge of the characteristics of the Milwaukie plant?

MR. MATHIAS: This is personal knowledge.

THE WITNESS: I was there once.

By Mr. Falls:

Q When was that, approximately?

A It would be at the time I did some work for the Department of Agriculture in Wisconsin which I think was around the mid-Sixties.

Q Did you have an opportunity to observe the plant or not?

A Yes, sir.

Q Were you able to make a determination as to the extent to

JUDGE HINKES: With that understanding, I think we can go on. Have you made some examination of Borden's accounting records relating to the Woodstock plant?

THE WITNESS: We have examined Borden's records in some detail and unit costs used with respect were not developed in the same degree or manner that we have done or that Haskins and Sells did at Milwaukie.

MR. MATHIAS: I will still object to this being unfounded. There is no underlying evidence or cited evidence to support that statement.

JUDGE HINKES: What I suggested before, it isn't you say there wasn't but that you found none.

THE WITNESS: Studies were average cost studies rather than specific costs to individual items. So that leads me to believe while I did not find a study of this type, there was probably no study of this type. In fact, he did use standard average studies.

JUDGE HINKES: All you can say of your own knowledge is you came across no study that you made here?

THE WITNESS: Right.

MR. MATHIAS: Or Haskins and Sells?

THE WITNESS: That is right.

By Mr. Falls:

Q Mr. Malone did not use any cost for Woodstock developed in this fashion from any figures you have seen?

nonsensical. This hearing would never end if we proceeded along those lines. This witness proceeded on certain assumptions. These taken general references by the witness are not to the point.

MR. FALLS: Your Honor is correct. There may be some relevance, but I think the witness should go ahead and give an explanation of his analysis.

MR. MATHIAS: I believe my objection is well taken that the witness has not laid a foundation for making certain statements of Mr. Malone's work and this type of modernization thing should be struck.

JUDGE HINKES: I don't know that we would accomplish much by it. This witness makes a statement which is clearly unfounded so far as the record is concerned.

I am referring now to the statement Mr. Malone used certain figures. First of all, that observation is based upon an exhibit not received in evidence. That is Exhibit 41.

Second, this witness has no personal knowledge of what Mr. Malone did. We are getting awfully far afield from a very accurate answer which is not particularly useful in this proceeding.

I am going to grant the motion of Mr. Mathias and ask what has Mr. Malone used. It is not fair as counsel should know.

MR. FALLS: As I say, let's get on with the witness.

THE WITNESS: The unit costs multiplied by the quantity

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produced at Woodstock in May '65 would give us the expense to produce these items at Woodstock and based upon three elements: Labor, ~~accelerating~~ EX-CELL-O rent and all other. By ~~accelerating~~ EX-CELL-O rent we mean rental on the machines that package the milk in paper containers.

At this point then we have a series of multiplications which tell us how much it would have cost to produce the quantity produced at Woodstock but at Milwaukie's costs.

Borden Company also had another internal record whereby it broke down the so-called other group or I should say broke down unit costs in a more defined manner than did the Haskins and Sells study.

We referred to that and used information in that report. That is why it is referred to here -- Borden formula unit cost for non-labor and non-Excelor costs.

MR. MATHIAS: Your Honor, could we have that internal document identified since it does not appear to be identified on the exhibit?

JUDGE HINKES: Yes, I think we must have that.

MR. FALLS: I believe it is identified in some of the attachments that have been sent to you gentlemen.

THE WITNESS: All documents I referred to here and all other charts have been attached to all of our calculation work sheets and have been available to the Commission.

MR. MATHIAS: They are not on the record ---

Q The Xerox did not show that very clearly?

A Right.

Q In any event, the formula cost that you used came from that column which is titled "All Other Expenses"?

A Yes, and we compared that figure against the actual expenses incurred at Woodstock for all other in May of 1965 and developed the ratio of 86.755 percent.

Q When you used the formula cost to determine the all other expenses for the various items, you found that after totalling that up that that was more than the actual all other expenses incurred at Woodstock?

A That is right.

Q So, some adjustment of the formula cost was necessary because of that difference; is that correct?

A That is right.

Q It is for that reason that you developed this ratio of 86.775 percent?

A 86.755 percent.

Q Having calculated the formula cost for each item, you could then convert that to the Woodstock cost level?

A Yes, that is right, and that is what we did as indicated on the chart.

Q Go ahead.

A I now direct your attention to the box called total actual expenses for Excelo machine rental, May 1965, $10,840.90.

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Q Let me go back. Is it correct the use of this formula cost derived from A&P 65 was for the purpose of dividing or allocating the all other costs among different items?

A That is right.

Q Not for determining the total cost level?

A That is right. We did not change the amount of money actually spent at Woodstock. That came from the actual records.

Q Now, go ahead.

A Now, I refer to the Excelo machine rental. The Excelo machine rental as indicated in the Borden records in no way allocated that or broke it up or charged it to the individual items and again item means each of the 11 private lable items that we are referring to. Case and Company developed a work sheet based on data in our files for allocating this amount of money to the various products.

MR. MATHIAS: Your Honor, complaint counsel are going to object to any testimony as to this data. It has not been provided to complaint counsel and we have been refused this data. It is highly irregular that a witness can introduce a chart and without providing underlying basic information.

Now, we understand that this item of expenses is going to be allocated based upon documents in Case and Company's files. Complaint counsel has asked for this data by letter, copies of which have been submitted to you. We had no idea how it was to be used until this minute and we don't believe any

We allocated that among the different items in accordance with the standards and work sheets to which I referred. At this point then, we have determined two facts. One is how much money was spent on the machine rental -- $10,480.90 -- and a set -- and an allocation of that amount among the different items.

Q For example, you would allocate some part of that to homogenized milk, paper quarts and so on down the list of items?

A That is right.

We added together the amount of money actually spent on the Excelo machine rental and we added together the actual expenses spent for the so-called all other category, as indicated here by my pointer, and subtracted them from the expenses I had referred to before, the expense being the amount of money that would have been spent to produce the quantity at Woodstock in May 1965 based upon the Milwaukie quantity costs.

After making that subtraction what we have is the amount of money that would have been spent at Woodstock for labor but at Milwaukie's labor rate.

I now come to the box other here. We compared the actual expense for labor at Woodstock in May 1965 by the Woodstock labor cost at Milwaukie's labor rates to which I just referred and determined a ratio of 143.759 percent. We then modified Woodstock's labor cost at Milwaukie's labor rate by that factor

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to get the labor expense at Woodstock based on Woodstock's labor rates.

We now have then across the bottom here three elements of cost -- labor expense for each item, the so-called other expenses for each item and the Excelo machine rental for each item.

They were aggregated into a total expense at Woodstock for each item.

We divided the amount of money so developed for each of the 11 products by the quantity of those products produced at Woodstock in May of 1965.

We then had a unit processing cost for each of those items.

Q So, the bottom line on that exhibit in effect is the unit processing cost for each of the private label items?

A That is true.

Q Separately stated in your underlying papers?

A That is true.

MR. FALLS: Unless Your Honor would appreciate any further recapitulation, we can go on to the next exhibit.

JUDGE HINKES: I think you can go on.

MR. FALLS: I would like to have marked as A&P Exhibit 115 for identification a sheet entitled "Summary of Processing Costs for Private Label Items."

(The document referred to was marked Respondent A&P Exhibit 115 for identification.)

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Q Would you explain that one to us?

A This explains in graphical form the method of determining the cost of loading trailers at Woodstock plant prior to sending the packaged material out to a redistribution point.

From A&P Exhibit 41 we had Woodstock production data telling us for May 1965 the total quantities shipped of every item. In this case I do not mean just of the 11 private label items but of every item of all types produced at the plant.

We had from another exhibit, A&P Exhibit 78, another set of facts which told us the number of packages of each different size container that fit into a case.

For example, six paper gallons go into a case or 24 quart containers go into a case and so forth. We then divided the quantity shipped of each item which is known fact by the number of packages per case to determine the number of cases shipped which is indicated at point A on that graph.

Q With respect to each item you divided the number shipped by the case size?

A That is correct, each item separately.

From Borden accounting records from Woodstock in May 1965 we know the amount of money spent on the loading function. Therefore, by dividing the dollars spent by the number of cases loaded and shipped we determined the loading cost per case as indicated at point B on that chart.

Now, that we know the cost per case, and up to this point we worked in terms of cases because in the trailer loading function they are handling cases, they are not handling individual containers.

Knowing the cost per case we divide that by the number of packages in a case, for example, 24. A case cost divided by 24 would be the cost of a quart container.

Going through the same arithmetic for the other package sizes we then developed the loading cost per item at point C.

MR. FALLS: I would like to have marked as A&P Exhibit No. 117 a schedule entitled, "Attachment III, Summary of Trailer Loading Costs."

(The document referred to was marked Respondent A&P Exhibit 117 for identification.)

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By Mr. Falls:

Q Did you prepare RAPX Exhibit 117?

A I did.

Q Would you explain it?

A This is the result of the cost accounting we went through as explained in the previous exhibit, Exhibit 116, and shows the cost for each of the different package sizes.

You will notice in this case we do not differentiate between type of product but only between type of container; that is whether the gallon container holds butter milk or homogenized milk or two percent milk, the cost of loading that onto the trailer is the same.

Consequently, this tabulation is limited to a differentiation between types of containers. So, any fluid milk product in a gallon container of paper would cost $.008904 and in a paper gallon it would cost $.004452, and so on down the list.

MR. FALLS: I would like to have marked as A&P Exhibit No. 118 a chart entitled, "Attachment IV, Hauling to Distribution Points, Cost per Item."

XXXX (The document referred to was marked Respondent A&P Exhibit 118 for identification.)

By Mr. Falls:

Q You prepared A&P Exhibit 118, did you not?

A Yes.

Q Would you explain that?

A This explains in graphical form the way in which we determined the cost of hauling each item, hauling being the function of taking it from the Woodstock processing plant to a redistribution point.

The underlying statistics developed on the number of cases loaded and shipped are the same as those previously described in the attachment relating to trailer loading, the same number of cases which were loaded also having been shipped.

However, not all of those cases were hauled to redistribution points. Some of those go out on trailer runs elsewhere. We are concerned now with the milk which is going through redistribution points or branches, using those terms synonymously.

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So, having determined the number of cases loaded and shipped and subtracting from that the number of cases and determining from that the number of cases hauled to redistribution points by subtracting out of it the number of cases that don't go that route, then we have the number of cases to which a certain amount of money would be applied.

For Borden accounting records, we determined the cost of owning and operating tractor trailers and contracting with private haulers to undertake this function, dividing that expense by the number of cases to determine the hauling cost per case.

Again, once we knew the cost per case, we then divided by the number of containers in the case to get the cost for a quart, half gallon, gallon, and so forth.

Q These cases that were not hauled to redistribution points were therefore not part of the divisor of those particular costs -- where did those cases go?

A They would go down state Illinois and Indiana.

MR. MATHIAS: Your Honor, if this is speculation, I don't think we need it.

THE WITNESS: I do not know from personal knowledge but I know from what is stated in the Borden records.

JUDGE HINKES: It is indicated on an exhibit?

THE WITNESS: Yes, sir. Maybe the word is wrong. It is in documentation which the Commission has received already ms-47 attached, accounting record attached which is specific as to how much money was spent.

By Mr. Falls:

Q If I understand you, there is a separate Borden account which collects these particular costs?

A Yes.

JUDGE HINKES: And that has been supplied to Commission counsel?

THE WITNESS: Yes.

MR. FALLS: I would like to have marked Exhibit 120 a chart titled "Attachment V, Anticipated Loading Cost/Item-Private Label Items."

(The document referred to was marked Respondent A&P Exhibit 120 for identification.) XXXX

By Mr. Falls:

Q Mr. Havemeyer, did you prepare RAPX Exhibit 120?

A Yes, sir did.

Q Would you explain it, please?

A We are now referring to the case merchandise being loaded onto local delivery trucks at the redistribution point or branch.

In this case we referred to information at the O'Hare branch because there was information available to us in the detail needed to make that analysis.

We determined from O'Hare sales data for May 1965 the

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quantity that was sold. We already knew from A&P 40 and 76 flow charts the amount per case. We converted this into the number of cases at O'Hare. This would represent the number of cases of all merchandise sold by the O'Hare branch.

However, there was a category of sales at O'Hare called counter sales. As Mr. Pergler has testified, these were not handled through O'Hare. They were on their books but not physically handled by them.

These counter sale cases although reported in their sales data were not in fact handled by them. We subtracted the number of cases which represent counter sales from the total number of sales cases which O'Hare sold in May 1965.

We then had at point B on this chart the number of cases loaded onto trucks at O'Hare. Again from O'Hare accounting records we had the amount of money spent for that in their accounting records.

Q That would be fore a separated cumulative Borden account?

A Yes. We then had the loading cost per case loaded onto trucks.

Q By dividing loading expenses by the number of cases loaded?

A That is right.

From an analysis of route books and as we would anticipate, namely, the one supporting the other, full cases don't always go on the truck. The route man does not order out full cases because of what he is going to deliver to his customers. So we did not actually assume that only full cases were handled. We went to a route book analysis to determine what the ratio or how many containers would be in cases actually loaded onto trucks.

Having determined this from records, as shown at point 5, we then modified this.

Let me illustrate in this manner: If there is not a full case of quarts of butter milk and there was not a full case of quarts of skim milk or homogenized milk or anything else in a quart container, those two packages are the same dimension, and they can be put in the same case.

The normal practice I have seen in the industry and I think Mr. Pergler explained has done and we took recognition into account. Therefore we modified the actual containers with cases as shown by route book analysis.

We used our judgment to raise that not, not the number of cases, not to a full 24 quarts per case but to a higher number, realistic, and backed up with some data and judgment and in the documentation provided the Commission on that point.

MR. MATHIAS: I did not want to interrupt until a convenient spot but I would like any reference to Mr. Pergler's testimony be stricken unless we have a transcript citation and are able to check it out.

I don't belive that it is possible for us to check it

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out at this moment. It would appear unnecessary to refer to Mr. Pergler's testimony.

JUDGE HINKES: It is this witness' impression of that testimony only and not necessarily binding upon anyone, so you need not concern yourself about that.

MR. FALLS: The witness, of course, relied on that along with other evidence.

JUDGE HINKES: He is only stating what he took to calculate these charts and the figures. They are not necessarily binding on anyone.

You may continue.

THE WITNESS: Therefore, we had a modified points per case, modified from the actual statistical records. Having that figure available and knowing the cost per case as I previously described up to point C, we then had the loading cost for private label points as determined from these two inputs.

By Mr. Falls:

Q Let me go back for just a minute, Mr. Havemeyer, on your description of the manner in which you determine the points loaded per case, the series of boxes in the lower-left-hand corner.

I believe you said you did actually examine route books?

A Yes, that is right.

Q You determined from the route books, I gather, the composition of a particular truck loading in terms of each item?

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A Yes.

Q When you say you exercised judgment, if I understand the area you are referring to, it refers to situations where those route books would show a truck loading which consisted of either a partial case or item or some full cases plus a partial case?

A That is true.

Q And you used your judgment to determine the extent to which those otherwise empty partial cases would have been filled with other products; am I right?

A Of the same dimension.

Q How many units are in a case of chocolate milk quarts?

A Twenty-four.

Q So, if you saw on a particular truck loading that the driver was only going to take out that day 10 chocolate quarts, you would assume he would not go out with a case with ten quarts in it and 14 empty spaces?

A That is right.

Q You have assumed he would try to fill up the case?

A Yes.

Q And the area in which you exercised judgment was to try to determine the extent to which that might be possible?

A That is right.

Q Let me qualify what you said just to be precise. It was not he, the driver, who filled up the case, it would be the

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loading crew.

Go ahead.

A We now have the loading cost per point. We used the same table of points which we have referred to previously -- do I need an exact identification?

Q Not unless anyone asks for it.

A We used a Borden document which has been identified. I just don't have the right notation here -- to convert the cost per point into the cost per item.

MR. MATHIAS: It would be helpful to identify the document.

MR. FALLS: We will take a moment and find it. It is one that has been referred to half a dozen times.

THE WITNESS: A & P Exhibit 66.

By Mr. Falls:

Q Have we reached the bottom?

A Having determined these costs, we determined the private label costs per item.

Q Here you have the individual loaded costs per item?

A That is right.

MR. FALLS: I would like to have marked as A&P Exhibit 121 a sheet titled, "Attachment V, Summary of Truck Loading Costs."

(The document referred to was marked Respondent A&P Exhibit 121 for identification.)

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By Mr. Falls:

Q Let me direct your attention to A&P Exhibit 121 and ask you if you prepared this?

A Yes, I did.

Q Would you explain that?

A This is the summary cost for various items as explained in Exhibit 120. In this case, there is a differentiation in the loading cost per item, not just the differentiated by container size but also by product for the reasons I described before, but I would like to remention them.

That is, the chocolate quart does not go out in full cases as does the homogenized quart. That is why you will see that the cost for the chocolate quart paper is higher than the cost of the homogenized quarter paper.

These results are partly dependent upon the judgment that I mentioned before, a judgment which is supported with some data.

If all merchandise went out in fully loaded cases, then the cost for any quart paper container would be the same, but that is not the fact. In fact, some container cost more such as the chocolate because of the fact that they do not go out all the time in full cases of chocolate quarts.

Q In other words, while the objective may be to have nothing but cases to have a low volumn item, that isnot always possible?

A That is right.

ms-54

The same thing can be seen with respect to whipping cream and half and half, the last two items there. The same ting can be seen in looking at the butter milk half gallon and the homogenized half gallon.

Q I take it, Mr. Havemeyer, it is correct to say with respect to Exhibit A&P 121 there are two variables that affect cost per unit in this area.

Let me withdraw this. I think I have myself confused.

MR. FALLS: I would like to have marked for identification as A&P 122 a document entitled "Attachment VI, Delivery Cost Per Item."

(The document referred to was marked Respondent A&P Exhibit No.122.)

XXXX

MR. MATHIAS: Could we have a couple of minutes break? It has been over an hours since the last break.

JUDGE HINKES: All right. We will take a short recess now.

(Recess.)

JUDGE HINKES: You may continue, Mr. Falls.

By Mr. Falls:

Q Did you prepare A&P Exhibit 122?

A Yes, I did.

Q Would you explain this?

A This is a graphic display showing the method of delivery, going from the branch to the store. There are several inputs to this. The amount of money actually spent comes from Borden accounting records.

Let me start over again, please.

I want to give a general picture.

The principle involved here is one which we have used consistenly in dairy industry accounting and you will find my use, and it is well accepted, and that is the cost of making a delivery is related to the time of making a delivery.

The more time spent in making a delivery, the most cost.

Disregarding efficiencies or inefficiencies, assume there is just a good level of efficiency in any distribution operation; the reasons for a cost of a delivery being higher or lower depends upon the amount of merchandise delivered.

The more you are delivering the more spend at a stop.

Secondly, the type of service rendered there. So if you do a lot of service in the store, it takes more time than if you do less service in the store.

So, these principles have been used in the determination of the delivery cost per unit of each item delivered.

Accordingly, we are going to first determine the cost of operating the route system per minute and that is done in the upper portion of this graph, whereby we drew upon expense records of the distribution costs to operate the route system.

You divide that by the number of route days in this

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ns-56

distribution system and this gives you a cost per route day. You determine the number of route minutes in that day and divide the cost per route day by the number of minutes per day to get the cost per route minute.

This cost per minute then will be applied to the number of minutes required to make a delivery.

We have that and come down to this section of the chart. We now determine the time required to make a delivery. That is based upon the number of containers of each item delivered and divide that by the number of containers in the case, gives you the number of cases in a delivery.

We then refer to the delivery conditions in the private label contract which describe in general the type of service to be rendered and selected delivery time standards which are applicable to those conditions -- delivery time standard applicable to delivery conditions as spelled out in the private label contract.

Since we know the quantity of merchandise delivered, the delivery conditions and therefore the time per those conditions, if we determine the minutes required to make a delivery of a certain size.

So, having determined the minutes required to make a delivery and the cost per minute, we have the delivery cost to make the delivery.

The same input which was used to determine the minutes ms-57 required to make the delivery, thatis the number of cases was then used to determine the cost per case and finally knowing the number of containers in a case and the cost per case, you divided the cost per case by containers per case you get the delivery cost per unit of each item delivered.

MR. FALLS: I would like to have marked as A&P Exhibit No. 123 ---

JUDGE HINKES: Before you go on, Mr. Havemeyer, I have one question.

This attachment like all the others has no footnotes, no source indicated, and I wonder whether you had any specific source other than what you have described as generally accepted principles of calculation?

THE WITNESS: First, the omission of source records is an oversight on my part. It was accidentally omitted. The principles are different from the source records. The principles we have used and many others have used in the dairy industry. I don't know if they will be challenged but they are well accepted principles, so the principles are quite apart from the source records.

By Mr. Falls:

Q Let's go through this and just make clear the kinds of source materials involved. The physical expense distribution data, the box in the upper-right-hand corner, I think you said that was taken from Borden accounting records?

A That is right.

Q And the relevant records are attached to the underlying materials furnished Commission counsel in connection with this exhibit?

A That is right.

Q What is the source of the number of route days?

A From Borden records, again documentation provided to the Commission. We know the number of routes operated and the definition of a route day is a single route operating one day. So, in a week a wholesale delivery route, meaning a store delivery route would normally operate six days.

We did not assume it would operate six days. There was a Borden statistical record which shows the number of days this route was operated.

MR. MATHIAS: Could we have a reference to the document? The fact that the document was supplied to complaint counsel does not always help us identify a document with the great mass of material supplied us. I think most of these probably are an RAPX number.

THE WITNESS: No. 74 provides some of this information, such as the number of routes of different types. A&P Exhibit No. 75 provides some information.

Accounting ledger, 7/23/23 provides the cost necessary to operate the wholesale delivery system other than the truck costs.

item and we had not yet covered the indirect marketing, general and administrative costs.

Q So at this point you want to take up where you left off and talk about the indirect marketing, general and administrative costs?

A That is right.

MR. FALLS: I would like to mark as A&P Exhibit 140 a sheet entitled "Attachment VII, Indirect marketing, general and administrative costs per point."

(The document referred to was marked Respondent A&P Exhibit 140 for identification.)

By Mr. Falls:

Q Looking at A&P Exhibit 140, is that a chart you prepared, Mr. Havemeyer?

A Yes, it is.

Q Explain what it shows.

A This is a flow chart which demonstrates the manner in which we determine the indirect marketing, general and administrative costs per point. It draws upon data in CX-54-B and in other data which I will describe in a moment. But from CX-54 we have an average cost per point for this category of items of $.0151. WE are now going to break that down and determine how much of that would be applicable to the private label business.

The figure of $.0151 has within itself segments. There are some segments which, in our judgment, are not applicable to the private liabl business at all, and they are as shown in footnote 1, local and national advertising, merchandising, and other income and deductions, and they total $.0037. So that was subtracted from the 0151 to produce $.0114, which is "The cost of items completely or partially applicable to the A&P private label business."

Now I am going to look at some of those segments in more detail.

Q At that point all you have taken out are the items you think are totally inapplicable to the private label business?

A That is right.

Now, a portion of this remainder of $.0114 is applicalbe and we looked at it forfour principal segments: Branch clerical expense, credit collection expense, general sales overhead and other delivery costs. And the figures seen in this box, $.0010, $.0004, $.0035 and $.0020 ~~column~~ come from the Borden Company records also.

With respect to branch clerical and credit collection expense, we analyzed the sales tickets in as much as those functions are related to the processing, the handling, the checking on, the working with, if you will, of sales tickess, and so we determined the number of sales tickets, or I should say a proportion of the sales tickets which would be applicable to the private label business as compared to those not applicable to the private label business and we went through an analysis of information not accounting information, but detailed information in the Borden records, I should say not just accounting information, which would enable us to make this analysis, and we determined that 75 percent of the sales tickets which are prepared by our route salesmen and handled through these fundtions of branch clerical and credit collection expense, was not applicable to the private label business.

Therefore, we taook, we deducted, I should say, 75 percent of the branch clerical and credit collection expense. I now

I now come down to general sales overhead. By referring to CX-4 and CX-42D we got information as to the amount of money spent on this function.

Starting with this figure and determining the proportion of private label business to total business that would be administered through the general sales overhead, we determined that 90 percent of that business and 90 percent of that cost was not applicable to the private label business, hence we deducted 90 percent of $.0035.

Now I direct your attention to --

Q What were the underlying documents you referred to in that analysis?

A CX-4 and 42D.

Q What were those?

A One was the Milwaukee Branch study by Haskins & Sells, and I believe the other is the proposal to build the Woodstock plant.

Now I refer to what Borden calls its "other" delivery costs, which in this record is shown as $.0020. That includes product waste and petty cash disbursements. By definition of the private label quotation, the product waste, which is actually the returns from the routes, was not to be of any benefit to A&P, that is, A&P did not have the privilege of returning outdated merchandise.

Also, an analysis of the petty cash account indicated that none of that petty cash was drawn on behalf of any work or function with A&P. I think Mr. ~~Purge~~ Pergler has also testified to that point.

We recognize, however, that occasionally -- excuse me. Let me go back and say on the basis of those two points we woul be justified in deducting 100 percent of the other delivery costs, however, we recognize that occasionally there is some bad merchandise which may go into an A&P store as well as into any other stores and Borden would take back bad merchandise which is delivered. So on the basis of judgment we said, "Well, we will at least charge to the A&P business at least 5 percent of those other delivery costs, to give some recognition to this point.

When we aggregate those deductions, they total $.0061, which is indicated in the box called "Items partially applicab

Borden would have achieved in the private label business, is that right?

A That is right.

Q Were you able to compare that figure with Borden's profit overall?

A Yes. Borden's profit overall in 1965 was less than that.

Q How much was it, do you know?

A It was 3.67 percent. 3.67 percent.

Q What is the source of that information?

A Borden's annual report, 1965, CX-212.

Q Were you also able to compare that figure of 10.62 percent with overall profits of companies engaged in the dairy business?

A Yes.

Q What was that comparison?

A The net profit for all companies in the dairy business was 3.77 percent in 1965.

Q Your Honor, I would like to now offer in evidence A&: Exhibits 109 through 123 inclusive, and 140 through 152 inclusive. All of these relate to A&P Exhibit 109 and the explanatory and backup documents in the exhibit.

JUDGE HINKES: Let's be sure we understand. You are not offering No. 138 and 139?

MR. FALLS: Well, 139 is the one that was merely explanatory of the previous documents. 138 I am not sure what it is.

Q And looking at the container cost for the private label, that would appeawr in each case where comparable products were carried under the Borden label to have a higher container cost than the Borden label container cost, is that correct , sir?

A That's right.

Q Yes.

A We used the higher cost.

Q Yes. When you state you used the higher cost, however, the cost that you did use was lower than that appearing on Commission Exhibit 54-B, was it not, sir?

A That is right.

JUDGE HINKES: Is there any reason why you didn't use the container cost of 54-B?

THE WITNESS: Yes, sir, of course. Borden includes in its container cost what is known as the production tental on the Pure-Pak machines which are the machines which are filled with paper containers.

MR. MATHIAS: I ask that the witness confine himself to his personal knowledge. I recall no testimony on the record as to what is included in this particular container cost.

JUDGE HINKES: Well, you will testify from your own knowledge, if you can; and if not, just say so.

THE WITNESS: I have to check myself on it, sir, but I believe the chart of accounts indicates it. I have to check it to be certain of it.

A I believe that is right.

Q I might refer you to Commission Exhibit 294-D for identification, and isn't it true that in the third paragraph on that page you state, "In practice dairies with utilitzation sharply higher or lower than average have variations of as much as plus or minus 50 percent in machine charges per quart and variations in cost for blanks ranging from plus 10 percent minus 10 percent based on the dairy's volumes of blanks purchased from the blank supplier?

A Yes.

MR. MATHIAS: Your Honor, the very pages submitted along with this summary sheet show it is absolutely less in this particular proceeding unless we have the underlying data and are able to compare it with Borden's operations at Woodstock in March or, rather, May of 1965.

There is just no way Complaint Counsel can cross-examine this document and I urge again, that the case law and the recommended procedures in such case is crystal clear, there is just no question that this, or the testimony concerning this particular study and calculations based upon it can not be introduced into this record.

MR. FALLS: May I ask another question or two at this point?

JUDGE HINKES: Very well.

does not exist.

JUDGE HINKES: Let me take it up at that point.

Insofar as any of these exhibits and any testimony from Mr. Havemeyer rests upon a study which has been lost or is otherwise unavailable and which therefore is not available to opposing counsel, it is unavoidable then to refuse to allow this to become evidence, that is, the testimony or the exhibits.

In brief, the availability or unavailabity of underlying documents which opposing counsel is entitled to, is the worry of the party offering the testimony, whether it is expert or otherwise. Insofar as underlying material is not going to be given to opposing counsel, for whatever reason, any testimony or cexhibits based upon it are inadmissible. There is no escaping that. We have to have authentication of the testimony or exhibits being offered. That authentication is in the underlying documents. If they are not available, the party offering that testimony must attempt to authenticate it in some other fashion.

There are other ways that are possible in most instances. But the mere unavailability of the underlying documents does not, by itself, constitute a reason for not offering it or a reason for permitting the conclusionary results as shown by the documentation in evidence.

MR. FALLS: Your Honor, I would like to speak to it for a moment, and indeed, I would like an opportunity to brief don't think it makes any difference whether it was exhibits or testimony, but based upon time studies he conducted as to which much of the documentation was --

JUDGE HINKES: You are putting me at a disadvantage, obviously. I am not prepared to rule on what had taken place with respect to Dr. Salverson .

I can only say this: My ruling is quite clear with respect to Mr. Havemeyer. Insofar as it is inconsistnt with anything done earlier in this proceeding, of course I am anxious to avoid any inconsistency and will entertain arguments on that subject, but am not prepared to entertain such argument here and now.

MR. MATHIAS: May I proceed, Your Honor?

JUDGE HINKES: We can break at any time convenient to you.

MR. MATHIAS: I have a couple more questions.

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CROSS-EXAMINATION

By Mr. Mathias:

Q Mr. Havemeyer, in your direct testimony you referred to certain elements of Respondent's A&P Exhibit 114 for identification as being based upon a formula found in Respondent's A&P Exhibit 65 for identification at that point.

Can you point out which of these items were so based, sir?

A I need my memory refreshed on what Ehxibit 65 is. I am sorry, I thought you said CX ---

Q No, A&P Exhibit 65(a) and (b).

A Yes.

Q I will hand you our copy of that.

A I understand now.

Q Would you explain for us which portions of Respondent's A&P Exhibit 114 are based upon this exhibit, sir?

A Well, when we got into the area of so-called "all other expenses," which, on the chart, would be the second of these three sections "all other expenses at Woodstock."

Q That is all other expenses besides machine rental?

A Besides labor. Labor machine rental and all other.

JUDGE HINKES: That category is entitled "Actual Expenses. All Other, at Woodstock," right?

THE WITNESS: That is right.

By Mr. Mathias:

Q Following down in a box right under that title there is documents are.

So I think this would be a reasonable way to approach it. Possibly we could take a late lunch hour this afternoon, whatever Your Honor desires, and then we can arrange to take a short lunch and meet back here.

JUDGE HINKES: All right. I will see that you have the afternoon open then for that purpose.

MR. MATHIAS: There was one item, too, before we get into this question of the information. There was one item of information Mr. Havemeyer was to determine for us that came up in the course of his testimony yesterday and I am not sure that in the summary that it was included yesterday.

And that was Mr. Havemeyer made some reference to testimony or an exhibit which in his opinion showed that the container cost as shown in Commission Exhibit 54-B included machine rental.

Now is that one of the items, Mr. Havemeyer, that you were looking up for us?

THE WITNESS: No, it wasn't.

JUDGE HINKES: It was mentioned in his testimony.

MR. MATHIAS: Yes, it was, but I didn't think it was mentioned in the summation.

JUDGE HINKES: It wasn't mentioned as something that he was to look up. That was a statement by him that 54 contained such an element of cost.

2566 MR. MATHIAS: No, but, Your Honor, in relation to later questioning I had asked what document or what exhibit or what testimony in this matter indicated this was the case, and he stated that he couldn't recall exactly.

This is a rough paraphrase, but it is my recollection that he stated that he could not recall exactly, that he thought there was some testimony or some calculation of Mr. Malone which showed that this included machine rental, and I had asked at that time that that be determined for us. And in the summation at the end of the day I had forgotten to include this in the list of items to be checked out.

JUDGE HINKES: Do you recall that, Mr. Havemeyer?

THE WITNESS: I don't recall it being asked as a question of me to be provided, but I will add it to my list.

JUDGE HINKES: If you will, then. Apparently that is the desire of Mr. Mathias.

VOIR DIRE (resumed)

By Mr. Mathias:

Q Now, Mr. Havemeyer, have you had the opportunity to check out any of the items we discussed yesterday afternoon as of this time?

A The answer to that is no, because the data I need is in our extensive files in New York and we have made arrangements for them to come down.

Q Now, Mr. Havemeyer, at the close of questioning yesterday

PROCEEDINGS

JUDGE HINKES: The hearing will be in order.

We had left off yesterday with the voir dire examination of the exhibits prepared by Mr. Hevemeyer. You may continue now, Mr. Mathias.

MR. MATHIAS: Before continuing the questioning, I might ask if Mr. Havemeyer has had a chance to obtain any of the information for us that we requested him to look up.

ROBERT G. HAVEMEYER, the witness on the stand at time of recess, resumed the stand and testified further as follows:

THE WITNESS: My office hasn't arrived yet. The shipping company only picked it up late yesterday afternoon.

MR. MATHIAS: All right, sir.

XXX VOIR DIRE (resumed)

By Mr. Mathias:

Q Mr. Havemeyer, now I would refer you to A&P Exhibit 116 for identification, which is entitled Attachment III, Trailer Loading Cost per Item, and I see that in the series of Exhibits 142 through 152 of A&P there is a similar section beginning with a copy of this exhibit and giving certain underlying computations.

In the first box on Respondent A&P Exhibit 116 there is a heading "Total Quantities Shipped by Each Item, Woodstock Plant, May 1955." Now this data was obtained from A&P Exhibit 41, is that correct, sir?

A Excuse me just a second.

I guess it was.

Q And I take it that was obtained from the third column of that exhibit, which is entitled "Units Produced, May 1965," is that correct?

A Yes.

Q The second item is the number of packages per case for each item. And this I see was obtained from A&P Exhibit 78. That exhibit merely shows the number of each package size which is contained in the case, is that not correct, sir?

A That's right.

Q Now, does this second box, the number of packages per case for each item, take into account mixed cases where there would be, say, a certain number of half-pints and quarts put into a case when there was not a full case of each?

A Are you asking that question in reference to A&P Exhibit 78?

Q No, I am asking this with reference to Respondent A&P Exhibit 116 and your underlying computations therein.

A No, it does not take into account mixed cases, because they would be loading full cases of material out of the plant.

Q In any event, if there were a mixed case shipped out of Woodstock, it would not take that into account?

A That's right.

Q Now, in the center of this exhibit, which is a flow chart, there is a box with the letter A next to it entitled "Number of Cases Loaded and Shipped, May 1965." Where do we obtain that information, Mr. Havemeyer?

A Well, you can read it directly from a section in III.

Q You are now referring to A&P Exhibit 142?

A Yes. Mine might possibly be out of place because I have taken it in and out of my book several times, but it is a sheet about 15 inches long, it is typed. I think you will recognize it if I show it to you. Its title is "Case Units and Container Costs, Woodstock - Fifth Period 1965." In my book it is in Section IIIB. And the underlying documents for that are in Section IIIA.

Q My copy of this exhibit that is in the last page of Attachment IIIA.

A All right then. I will put mine in the same place so that if we have additional references to it, we will be talking about the same spot in the book.

Q That particular document to which I have just referred, which is a part of Attachment IIIA in A&P Exhibit 142, is entitled "Case Units and Container Costs, Woodstock - Fifth Period 1965." Now what figure taken from this page would appear or would be referred to in this box A on the flow chart, which is "Number of Cases Loaded and Shipped, May 1965"?

A There is a circled figure about the third line from the

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bottom, 580,642. You will find that figure posted on Attachment IIIA.

Q Now, on Attachment IIIA to which you have just referred, it appears that this number is arrived at by dividing the first two lines on that attachment for which there are no figures given, the first being "Borden Company Central District, Estimated Plant Processing Cost by Products and Unit Size, May 1965," dated 10-12-65, and in the right-hand margin is a tabulation of quantity produced and the second item is "Borden Document Data for Cost Department, July 1971" table with a number of containers per case by type of product. I take it that this second item, the table number of containers per case, is A&P Exhibit 78 to which you have previously referred, is that correct, sir?

A Yes.

Q Now what document are you referring in Item 1 on Attachment IIIA?

A Well, there is a column entitled "Units Produced, May 1965" and in that column you will find for each of the products and package sizes which were produced at Woodstock in May 1965. You will find the quantity figure in the column entitled "Units Produc ed, May 1965" and we divided as an example ---

Q Excuse me. You are one step ahead of me, Mr. Havemeyer. You are apparently reading from the document that I am asking about. I have asked you to identify which document it is that you have obtained this information from. I would like to know the A&P exhibit number.

A Oh, A&P Exhibit 41, which you will find attached to the page you are looking at right now.

Q Now the worksheet to which you have previously referred, "Case Units and Container Costs, Woodstock - Fifth Period 1965," was that compiled by using these two exhibits, A&P Exhibit 41 and A&P Exhibit 78?

A Yes.

Q And Attachment IIIA is apparently what appears to be the formula which you have used in that worksheet, is that correct, sir?

A That's right.

Q The next item on your flow chart, which is A&P Exhibit 116, is a box in which the number 3 appears in the lower left-hand corner and which is entitled "Loading Expense, Woodstock Plant, May 1965." I see in A&P Exhibit 142A Attachment IIIB, entitled "Loading Cost per Case." Would that be the document which we would look to to determine your calculation of the loading expense at the Woodstock plant for May 1965?

A Yes.

Q Now, referring to Attachment IIIB in RA&PX 142, there are a number of items which go into this calculation and first is listed as Account 703-37 for May '65, Loading Cost, and it is listed at $29,237.58. Now where do we find that figure, Mr. Havemeyer?

A If you will turn two pages, you will find a copy of the ledger card for Account 703-37, and you will find a circled figure on there of $29,237.58.

Q Now this ledger card was taken or is a part of A&P Exhibit 71, is it, sir?

A Yes.

Q Now the second item on this Attachment IIIB is the number of pallets and you refer back to Attachment IIIA?

A That is a mistype. That should be IIIB. The number of pallets is on the page following the one we are looking at.

Excuse me. That is not exactly true either. It is a combination of data in IIIA plus the following page in IIIB. I really should say not to change IIIA to IIIB, but rather make that "See Attachment IIIA and IIIB."

To be more specific, you will find on that following page a figure of 18,245 and you will find a derivation for it and that figure has been transferred to the first sheet of Attachment IIIB, which is the sheet we are looking at.

Q Now, the cases per pallet, this still does not appear to me to be on Attachment IIIA. Could you possibly be referring to the work paper which has been identified as a part of Attachment IIIA?

A Yes.

MR. FALLS: Well, it is IIIB, you said, didn't you?

THE WITNESS: I am saying to derive the number of pallets, 18,245, we used data from Attachment IIIA and more specifically that long worksheet that we have referring to ---

By Mr. Mathias:

Q That is entitled "Case Units and Container Cost, Woodstock - Fifth Period 1965"?

A Right, and the calculation of the 18,245 you will find on the page following the page we are now referring to.

Q That is also marked Attachment IIIB and it is listed and entitled "Number of Pallets Loaded at Woodstock"?

A Right.

Q Now, in referring to both of those sheets, I do not find the numbers 30 or 36 which you have used on the second Attachment IIIB, 30 cases per pallet apparently for the paper products and 36 cases per pallet for the glass products. Where do I find that reference in these sheets?

A You won't find it on those. In Mr. Pergler's testimony after this whole package of documentation had been put together and after all the costs had been calculated, we then heard Mr. Pergler, who said -- I do not have a page reference, but I know it is in there -- that for the products packaged in glass that they were shipped from Woodstock in 36 cases per pallet, and the other products were shipped at 30 cases per pallet. Accordingly, we had to go back and make many changes. That was one of the reasons there were delays in getting that documentation package to you.

Q Now, sir, the third line on the first page marked Attachment IIIB is entitled "Loading Costs per Pallet" and appears to be just a straight division of the line 1 figure by the line 2 figure, is that correct, sir?

A Yes.

Q Then there is a further breakdown. You have products packed in paper loaded 30 cases per pallet, and you have a cost per case. How is that figure arrived at, sir?

A By dividing the third line of $1.6025 by 30.

Q And the fifth line is entitled "Products Packed in Glass Loaded 36 Cases per Pallet," and there is a cents figure per case in the right-hand column on that line. How was that obtained?

A By dividing the third line of $1.6025 by 36.

Q Now, sir, I see down below that another series of lines under the general heading "Private Label Items" and you have figures listed fractions of dollar on a per-unit and per-point basis in two columns. How were the figures obtained here? Let's take the paper gallons first as the first example and explain to us how you derived the figures under the per-unit and per-point columns there.

A All right, we divided line 4, which is the cost per case for items packaged in paper, which figure is $.053417, which we divided by 6 inasmuch as there are 6 paper gallons per case. That gave us the cost per unit of $.008904. That figure was then divided by the number of points per unit and in the case of the paper gallon homogenized milk it would be four points, so $.008904 would be divided by 4 to get $.002226.

Q Then I take it in the case of the half-gallon you divided line 4 by 12, which appears to be the number of half-gallons per case listed here to get the per-unit figure and then you divided that, I take it, by 2 in order to reach the per-point figure, is that correct, sir?

A That's right.

Q And if we went through the quarts and pints and half-pints, it would be a similar calculation?

A That's right.

Q Now the seventh line is "Glass Gallons per Case" and again there is a per-unit and per-point column. How were these figures obtained, sir?

A The cost per case for items packaged in glass is shown on line 5 as $.044514. This was divided by 4 because there are four glass gallons to a case in order to determine the cost per glass gallon, so that then became $.011128 per glass gallon. A glass gallon of milk is worth four points and so the last figure I mentioned the per-unit cost was divided by four to get the cost per point of $.002782.

Q Now these computations of the private label item costs would be dependent upon your assumption that the pallets were loaded fully with, say, one pallet was loaded completely with paper gallons of private label product and the pallets involved with the half gallons were fully loaded with cases of paper half-gallons, and so forth, would it not, sir?

A No.

Q Well, in case there was a mixed pallet of paper gallons and half-and-half pints, for instance, of private label items, how would that be affected by this computation? Or how would that affect these computations.

A It would not affect these computations, because all items packaged in paper were stacked 30 cases per pallet, so whether it was a mixture of paper gallons and paper half-gallons, it was still 30 cases per pallet, so the cost per case would still be the same for either item on a mixed pallet, although in practice in all the dairy plants I have been in, especially large volume dairy plants where they ship pallet loads, a large proportion of those pallets go out loaded with the same type of item.

Q Now have you ever been in the Woodstock plant, Mr. Havemeyer?

A Yes.

Q Were you in the Woodstock plant during this period of time of 1965?

A No.

Q Did you observe their loading -- well, if you weren't there, obviously you did not observe the loading practices of the Woodstock plant at this period of time, is that correct, sir?

A That's right.

Q I note that the half-and-half pint, for instance, has a point value of one point, does it not, sir?

A Yes.

Q Now, if you had a pallet mixed half paper gallon cartons of A&P label milk and half-and-half pints, wouldn't there be a difference in the per-unit and per-point cost of that pallet?

A No, sir.

JUDGE HINKES: The difference would be in the case, not in the pallet, is that right?

THE WITNESS: That's right. The loading crew is handling pallets of merchandise and the cost is first determined per pallet. Now per the testimony of Mr. Pergler, all the paper items were packed on a pallet as 30 cases per pallet, so long as there were 30 cases on that pallet as he testified, then it made no difference in the cost per case whether it was holding gallons or half-gallons or quarts or whipping cream or what-have-you.

By Mr. Mathias:

Q Well, let's go back a few steps beyond where you have made your computations on a per-unit and per-point basis back to line 3 where you determined the loading cost per pallet by dividing the loading cost by the number of pallets loaded. You have assumed here that the same amount of effort has gone into loading each and every one of those pallets, is that not correct, sir? The same cost.

A I have not had to assume that. They loaded so many pallets and they spent so much money.

Q In other words, you have allocated an identical expenditure for the loading of each one of those pallets?

A Yes.

Q Now, did you in your computations take into account any extra effort that would have to be made in making up special pallets of mixed loads of private label and Borden label where there was not a full pallet of private label being shipped out?

A No, because again ---

MR. MATHIAS: No. Your Honor, I have asked just for a "yes" or "no" answer.

MR. FALLS: Your Honor, I think the witness should be permitted to explain.

JUDGE HINKES: Yes, the witness will be allowed to explain his answer if he wants to.

THE WITNESS: Thank you. As I stated before, if that pallet is holding items packaged in paper, whether that be private label or Borden label, whether it be a mixture of gallons and half-gallons, the cost of carrying the pallet would be the same.

By Mr. Mathias:

Q Mr. Havemeyer, it would be true, would it not, that if in the loading process certain pallets had to be manually manipulated so that a portion of the -- in other words, a portion of Borden label product would have to be mixed with a portion of A&P label in order to make up a full pallet, there would be additional costs involved in making up that pallet, would there not, sir?

MR. FALLS: I object to the question on the ground that it is based on a factual hypothesis as to which there is no evidence.

MR. MATHIAS: Your Honor, that objection is without basis. Mr. Pergler has testified that frequently in the transportation of pallets from Woodstock to the O'Hare branch that there had to be mixed pallets where there was not enough of private label products on the pallet to make up a full pallet and that it was the practice of Borden to ship only full pallets out of Woodstock, so that it was on a frequent occasion that mixed pallets would be received from Woodstock containing partially private label and partially Borden labe.

Now, all I have asked the witness is if in his computation any accounting was taken of the labor necessary to mix such pallets.

JUDGE HINKES: I will overrule the objection.

THE WITNESS: Would you like to restate the question?

(The reporter read the question.)

THE WITNESS: Theoretically there would be some additional cost. In my opinion it would be minuscule.

By Mr. Mathias:

Q Whether it was minuscule or not, you did not take into account any such possible differences, is that right?

A That's right. And if the cost was ---

MR. MATHIAS: Your Honor, I don't believe any further explanation is necessary.

MR. FALLS: I think the witness should be allowed to complete it.

JUDGE HINKES: Have you completed your answer?

MR. MATHIAS: Your Honor, I don't believe that the witness should be allowed to testify on his own basis as to any particular topic that comes to his mind. I believe that the witness answered my question fully and completely and I don't believe that it is proper just to allow him to wander on. I realize that this is voir dire rather than cross-examination. However, complaint counsel is entitled to completely responsive answers just as respondent was so entitled and in accordance with the rulings Your Honor made in connection with respondent's voir dire of various witnesses.

MR. FALLS: We don't know if the witness has completed his answer.

JUDGE HINKES: Well, I must allow this particular witness to have perhaps a little greater leeway. He is an expert on the stand. His opinions are valuable, and I don't think it is advisable to limit him to cryptic answers when perhaps a better understanding of the whole case might be obtained if he were allowed to speak a little more freely.

The only thing is I just want to be sure that he has completed his answer and that was my last question to Mr. Havemeyer.

THE WITNESS: In truth, I answered that question. I was going to expand on it.

JUDGE HINKES: Well, if you have already answered the question, I don't think that any further expansion is necessary. What I am looking for is the explanation if you had any explanation.

THE WITNESS: I would like to get a piece of paper to make a note of something.

MR. FALLS: I would like to have the question and answer read back so that I will be clear on what was said if I want to develop further on his examination.

JUDGE HINKES: Sure. You may read the question and answer.

(The reporter read the question and answer.)

JUDGE HINKES: You may continue, Mr. Mathias.

By Mr. Mathias:

Q Now referring to the long worksheet to which you have previously referred ---

A Mr. Mathias, would you excuse me a minute? I want to make my note.

Q I am sorry. I didn't mean to interrupt.

A All right, sir.

Q Now, Mr. Havemeyer, do you know from your own experience or from any evidence of this record as to how the cases of Borden label and A&P label were stored at the Woodstock plant? Do you know whether they were contiguous, whether they were far apart, in different rooms?

A I don't recall any specific information on that right now.

Q Now, Mr. Havemeyer, referring to this long worksheet to which you previously referred in connection with Attachment IIIA in A&P Exhibit 142, looking down the extreme right-hand column you have computed out the number of cases of each of these items which were shipped by Woodstock in the fifth period of 1965, which I would take it would be May 1965, is that correct?

A Yes.

Q Now, first, Mr. Havemeyer, I note that if we go down through this list of cases for each item and divide each of these items by 30 in the case of the paper containers and 36 in the case of the ~~gallon~~ glass containers, they do not appear in any case to come out to even pallets; is that correct, sir; or at least as a general rule they do not come out to even pallets?

A Looking at the items packaged in paper where my mental arithmetic would be rather easy using 30, it does not appear that there are any which come out to even pallets, although perhaps there might be one or two, but I don't see any right away. Looking at the items packaged in glass, I can't do any mental arithmetic by 36 that quickly, but I would assume that there would not be an even number of pallets.

Q Now, sir, referring back to Attachment IIIB in A&P Exhibit 142, and the ledger card to which you have referred as being a part of A&P Exhibit 71, appearing at the top is the notation 703-37, and handwritten notation "Loading EXP," and the total down below of all of the figures appearing on there appears to be $29,237.58, which is the loading cost used in your calculations on Attachment IIIB.

Now, sir, did you make any check to determine if all loading expenses were included on this ledger card?

A I personally didn't. My staff made some type of check.

Q Can you tell us what check was made by your staff, sir?

A No, I can't be specific now, but they were instructed to be not only on this account, but other accounts as well to be alert for transfers into or out of accounts to be alert for -- oh, what will I say -- functional expenses which seem to be unaccounted for, in general to see that the amounts in an account seem to represent the function as indicated by the account number.

Q Sir, you had ledger cards for two periods of time, did you not, sir, for May 1965 and March of 1966?

A I think so.

Q Was any check made to determine whether or not the expenses between those two periods of time coordinated with each other?

A I couldn't answer that, no.

Q Sir, referring you to the ledger sheet which is a part of A&P Exhibit 142 and is also a part of A&P Exhibit 71, I would also like you to compare the ledger sheet for this same account number location 703 account 037, for March of 1966, and I call you to one subaccount No. 20 listed as "Depreciation," which shows a depreciation figure of $622 for that month in 1966.

MR. FALLS: I would like to get that sheet in front of me, Mr. Mathias.

MR. MATHIAS: It is part of 72. The sheet that I have just handed to Mr. Havemeyer, the March '66 ledger card, is a part of RA&P Exhibit 72 and is entitled "Location 703 Account 037, Loading Expenses."

MR. FALLS: Maybe it would be easier if I just looked over his shoulder.

By Mr. Mathias:

Q Now, sir, looking at the ledger sheet which is a part of A&P Exhibit 142 and which is also included in A&P Exhibit 71, going down through the various subaccount numbers on that page, I did not find any subaccount No. 20 corresponding to the depreciation account in March of '66, is that correct, sir?

A That is correct.

Q I would also refer you to Respondent A&P Exhibit 67, which is a chart of accounts, and gives the location 703 and the Account No. 037, behind which in each instance is the title "Loading Expense" and then various subaccounts, and their identify, and behing Subaccount 20 is listed the expense depreciation.

Now, sir, it would appear, would it not, that the ledger card which you have used for May of 1965 does not include a depreciation expense, is that not correct, sir?

A That's right.

JUDGE HINKES: Would you have any explanation for the omission?

THE WITNESS: Yes.

JUDGE HINKES: I would like to hear it.

THE WITNESS: I have to make a supposition now, because I only have these facts before me.

MR. MATHIAS: Your Honor, unless there is some basis in the record for his supposition, I don't believe such testimony should be allowed.

JUDGE HINKES: No, I think in his role as an epxert he is entitled to give an opinion.

THE WITNESS: First, a literal interpretation of the account for May of 1965 would imply that there was no depreciation on pallets at Woodstock. An explanation for that could be that they used the pallets from closed plants, which pallets had either been expensed at the time of purchase or completely depreciated and that the added depreciation amount in March of 1966 would have represented the depreciation on the additional pallets purchased between 1965 and 1966. And, therefore, that added depreciation would not be applicable to May of 1965.

JUDGE HINKES: But this, as you say, is a supposition?

THE WITNESS: Yes, but what is not a supposition is that Bordens in its accounting statement said there was no depreciation in May of 1965.

By Mr. Mathias:

Q Now on this particular page there is no depreciation includ
is that not correct, sir?

A That's right.

Q Isn't it possible, sir, that Borden had a different method of accounting in 1965 and that this expense was accrued on a quarterly basis or on some other basis rather than a montly basis?

A Anything is possible.

Q Well, sir, wouldn't the loading equipment as well as pallets be included in this depreciation expense? The forklift trucks that were used or whatever other loading equipment was used to load the trucks?

A You would have to go to an expanded definition of the accounts to determine that.

Q Now, sir, you have given one possible explanation that the pallets were taken from a closed Borden plant. Do you have -- is there any evidence in this case that you are aware of that indicates that Borden used pallets in any of its other plants?

A I can't recall any evidence to that effect.

Q Isn't it true that the information and the testimony and exhibits in this case involving the newness of the Woodstock plant and the innovations therein listed pallet savings as one of the big innovations of the Woodstock plant?

A Yes.

MR. MATHIAS: Your Honor, the witness has been on the stand for an hour. I wonder if we could take a few minutes' break.

JUDGE HINKES: Certainly. We will take a short recess now.

(Whereupon, a brief recess was taken.)

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JUDGE HINKES: You may continue, Mr. Mathias.

MR. MATHIAS: I see that all of the A & P counsel are not back in.

MR. FALLS: I will hold the fort, Mr. Mathias.

MR. MATHIAS: All right.

By Mr. Mathias.

Q Before I leave Attachment 3 to A & P Exhibit 142, dealing with the loading costs in connection with those calculations, sir, I asked you some questions concerning whether or not you considered any special handling costs if they were incurred for the A & P label product. Now, to take this back one step to the production level, the plant processing cost which you had calculated in Attachment 2 to 142 and which appears on the flow chart on exhibit -- A & P Exhibit 114 for identification -- if any additional costs were incurred for the production and handling of private label at the processing and production end of your calculations, we such additional expenditures taken into account in your calculations?

A Now, but I don't think I should answer with just a single word there.

Q You may explain it.

A First, I don't recall anything in evidence indicating that there were any special costs in that respect, and secondly, without thinking of every minor function that goes on in processing, I don't know of any -- I don't know of anything significant which would cause added cost in producing private label items in the processing function.

Q But in the event there were such added costs, you did not consider them in your calculations?

A That is right.

Q Now, sir, referring to R - A & P Exhibit 117 for identification, those are merely the conclusory figures you have arrived at through the flow chart used on R - A & P Exhibit 116, is that not correct, sir?

A That is right.

Q If we went back to R - A & P Exhibit 15, which was the processing costs, those would just be the conclusory figures you arrived at using your procedure shown on the flow chart on A & P Exhibit 114 for identification, is that not correct?

A Yes.

MR. FALLS: I think maybe you said "15," and it should be "115."

MR. MATHIAS: Oh, excuse me, "115," yes.

By Mr. Mathias:

Q Now, Mr. Havemeyer, I would like to refer you to R - A & P Exhibit 118 for identification, and am I correct in assuming that Attachment 4 in Exhibits 142 through 152 for identification would correspond to the flow chart and underlying calculations represented by R - A & P Exhibit 118?

A Yes.

morning, which has appeared in, I think, the two previous attachments and there is a circled figure of 580,642.

Q This is the Case & Co. worksheet, entitled "Case Units and Container Cost, Woodstock, Fifth Period 1965"?

A That's right.

Q And I believe you said earlier that this page was derived from RA&P Exhibit 41, is that correct?

A Yes.

Q So you have taken this figure down below, 580,642, the circled figure, as the number of cases produced at Woodstock in May of 1965, is that correct?

A Yes.

Q Now on the next line you have "Less Bulk Items Not Significant in Counter Sales." What is meant by this, sir?

A Well, by the term "bulk items" we mean products which are in generally multi-gallon packages and are typically referred to in the dairy business as bulk items. Milk in dispenser units, mainly things like that.

Q Where do you obtain this information, bulk items?

A If you look on the Case & Co. worksheet that we have referred to several times and which is the second sheet behind Attachment VA, you will see just above it the section captioned "Cottage Cheese," some totals there, and one of them is 1,040,950, and that is the point volume of the bulk items which precede it.

Q That would be the items beginning with homo. six-gallon, regular?

A Yes.

Q Right above the figure 1,040,950 is the figure 1,020,928 quarts. What is the significance of that?

A Really no significance. We multiplied the number of gallons by four and got the number of quarts, but it was not used.

Q So that was not an indication of the number of points, is that it?

A No.

Q Some of these items were not on a straight quart-per-point basis. Would that be the explanation?

A That's right.

Q Which ones? Would you be able to point out to us which ones were not on a straight quarter basis in their point value?

A Well, the most obvious ones are the cream items, one of which is 36 percent cream in five-gallons, and then there is a 12 percent cream in six-gallons, and I am not certain of this at this time, but I believe the 18 percent item is also an 18 percent cream in six-gallon containers.

Q How did you figure the points on these items that you have just referred to? What point value? For instance, the 18 percent, six-gallon container, how did you compute the point value of that, sir?

A I will need a minute to search for something.

If you will turn back to Section IIIA, and the third page from the end of that section, it is headed "Estimated Case Volum for Miscellaneous Bulk Containers." This shows the data which we used both to determine the number of cases for the quantity of each of these products as well as the number of points.

Q Now, is this a Case & Co. worksheet?

A Yes.

Q What document or exhibit in evidence in this matter assigns these point values to these items?

A I believe it is page 7 of the procedure outline. At least that is what it is known as. I don't remember the exhibit number.

Q Whose procedure outlines?

A The procedure outline prepared by the Borden Company. All right. It is one of the exhibits.

MR. FALLS: Is this the Borden bid? I am not sure ---

MR. MATHIAS: These bulk items are not in the Borden bid.

MR. FALLS: No, but we are talking about point values.

THE WITNESS: A&P Exhibit 66. That includes a table of point values.

By Mr. Mathias:

Q Which page of that exhibit?

A I think it is page 7.

MR. FALLS: Do you have it in front of you, Mr. Havemeyer?

THE WITNESS: No.

MR. FALLS: Would you like one?

THE WITNESS: Please.

By Mr. Mathias:

Q Do you have the document in front of you now, sir?

A Yes.

Q And is the page 7 of that exhibit, sir?

A Yes, and you look at the value for half-pints of whipping cream, for pints of half-and-half, quarts of half-and-half, and you can see the point values which are assigned for small packages of creams, and we extended those upwards to get point values for large packages of creams.

Q These are estimated points estimated by you. They do not appear on the original Borden document insofar as the bulk containers we are now concerned with, do they, sir?

A I object to the word "estimated." It is a calculation right from this table.

Q Sir, the heading of your document states "estimated." I was just paraphrasing your own language.

MR. FALLS: Which document?

MR. MATHIAS: The one to which he originally estimated case volume for miscellaneous bulk containers, which is a part of Attachment XIIA to 42.

THE WITNESS: Well, the data on that page to which you just referred is used to estimate the case volume, but the data on that page as far as point value is concerned is not an estimate.

By Mr. Mathias:

Q All right. Looking at page 7 of RA&PX 66 and the page to which you referred us in connection with Attachment IIIA of Exhibit 142, to what item would we refer for this 18 percent, six-gallon contain on RA&PX 66, page 7, in order to arrive at your point value?

A Well, there is no multi-gallon container on page 7, as I mentioned before, which used the point values on page 7 to get the point value for multi-gallon containers.

Q But which item on page 7 of A&P Exhibit 66 is 18 percent? I don't see any item listed on that page which states 18 percent.

A Oh, that's right. There is no 18 percent item specifically listed on page 7, but it is typical in the industry and in the Chicago area to assign a similar point value to the heavy creams, 18 percent being not as heavy as 36 percent, but being one of the heavier creams.

Q So you have made a judgment here that the 18 percent would have the same point value as 36 percent cream?

A Yes.

Q Have you found any record of Borden assigning a point value to this item?

A You mean in the record?

Q In the record, yes.

affect this average figure?

A Yes, it would be a more favorable figure from the A&P standpoint.

Q Why is that, Mr. Havemeyer?

A Well, if you have a higher proportion of glass items going to Streator, then you have got a higher proportion of paper items going to, say, O'Hare.

Q Isn't it also possible, Mr. Havemeyer, that each of the various branches operated to which Woodstock shipped product would have a very different product mix handled out of that branch?

A You said "very different"?

Q I say "isn't it possible"?

A Oh, anything is possible.

Q Sir, following your calculation of cases delivered to O'Hare, which appears on this page as 210,382 cases, your next calculation on line 4 would appear to subtract the amount of cases sold to counter customers at O'Hare, is that correct?

A Yes.

Q And your ultimate figure then after subtracting that is the total number of cases loaded onto the trucks at O'Hare for the fifth period of 1965, is that right, sir?

A Yes.

MR. FALLS: Your Honor, I wonder if it is near the time when we might take a short recess. The witness has been on the stand for almost an hour.

MR. MATHIAS: All right, sir. It is fine with us, Your Honor.

JUDGE HINKES: Just one question I had. You refer again to the figure of 44,000 on the fourth line of VB, and I think we should note at this point once again that that figure has been changed to approximately 39,000, so that the end result is not 165,000 on line 5, but 170,000 roughly.

MR. MATHIAS: Your Honor, I would believe that there would be some question as to even the propriety of that 39,700.

JUDGE HINKES: Well, I am only stating what the witness has testified.

MR. MATHIAS: Based upon the assumptions the witness has made, that would be an appropriate correction.

JUDGE HINKES: In other words, the witness is no longer sticking to the 165,000 figure. Let's put it that way.

MR. MATHIAS: All right.

JUDGE HINKES: Very well. We will take a short recess.

XXX (Whereupon, a brief recess was taken.)

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JUDGE MINKES: You may continue, Mr. Mathias.

By Mr. Mathias:

Q Mr. Havemeyer, to go back to attachment 5-A for a moment, if we assume that the counter sales which we have identified as being primarily sales to the Great Lakes Naval Station, were not primarily made up of the bulk items, was any study made of the costs that would be allocable to the handling of the bulk items?

A Mr. ~~Berger~~ Pergler testified that that volume did not physically move through O'Hare.

Q You are talking about now the counter sales.

I am stating if the counter sales, that is, the sales to the Great Lakes Naval Station, were not primarily the bulk items.

A Yes.

Q Was any study made of the cost of handling the bulk items at O'Hare as compared to the cost of handling the other items, the containers of gallon and smaller?

MR. FALLS: Let me ask you, are you talking now about truck loading cost which is the subject of these exhibits?

MR. MATHIAS: Yes, I am talking about this particular attachment, the loading cost per item.

THE WITNESS: No, there was no information available that would enable us to break that down that finely.

By Mr. Mathias:

Q There were bulk wholesale routes out of O'Hare, were there not, sir?

A Yes.

Q To this point, we have discussed Attachments 5-A and B.

If we look at the flow chart, that would bring us down on your flow chart, which has been identified as A & P Exhibit 12 to the block lettered B, entitled "Number of Cases Loaded onto Trucks at O'Hare," would it not, sir?

A Yes.

Q Turning to Attachment 5-C, the second item listed on that page is the number of cases loaded onto trucks.

This would correspond to the block B on your flow chart on Exhibit 120, is that correct, sir?

A Yes.

Q And that number as it appears in Attachment 5-C is 165,532, is that correct, sir?

A Yes.

Q And that is the figure that is computed on Attachment 5-B; I see on Attachment 5-C, it refers to Attachment 5-A. That really should refer to Attachment 5-B, should it not?

A Yes, that is true.

Q And now there is some question as to whether this number should be 165,532 or 170,000; is that correct, sir? Or approximately 170,000?

A Yes. There seems to be that kind of question.

Q On Attachment 5-C, the first item is noted as being accou No. 727-37 ---

MR. FALLS: 723.

By Mr. Mathias:

Q Excuse me, 723-37 for May of 1965.

Is that the copy of the ledger sheets or is that taken from the ledger sheets which immediately follow Attachment 5-C in Exhibit 142?

A Yes.

Q Turning to those ledger sheets, I see on the bottom of th first sheet a written notation, net, $18,731.48. Whose writir is that, sir?

A I believe the word "net" is our writing, although I am nc certain of that, and the number, I am not sure who wrote that.

The reason, you may recall I mentioned before that I cannot always distinguish between who has written numbers as compared between my Staff and somebody else.

In any case, it is the difference between the figure of 19,739.92 and 998.44.

Q 998.44 appears under the Credits Column on this account, is that correct, sir?

A Yes.

Q And this $18,000 figure is the one you have carried over to Attachment 5-C, is that correct?

A That is right.

Q Are there any other costs in the Borden ledger accounts which would have a bearing upon loading costs?

A Not according to the Borden accounting system.

Q What about building costs? Would any portion of that be attributable to the loading cost?

A Bordon's accounting system did not go into that degree of refinement, apparently.

Q Does your accounting procedure in this analysis include building costs in any of its subdivisions?

A It would be picked up in another account. Just which one, I can't recall.

Q I would like to hand you a ledger card which is a part of A & P Exhibit 71, account No. 723-8, which according to the chart of accounts of Borden is building expense account for the O'Hare branch.

MR. FALLS: What was that number?

MR. MATHIAS: Location 723, account 8.

By Mr. Mathias:

Q And I have not been able to find that account utilized in any of your computations.

Could you tell us where it does appear, if it does?

A No, I would have to check on this, sir.

Q Would one method of accounting attribute either all or part of the building expense to loading expense?

A Well, not under the Borden accounting system.

Q Would you attribute any building expense to the loading expense function, sir?

A Under a very refined and unusually detailed study, the loading platform space, which is generally an unwalled, but perhaps covered part of the plant; namely, being outside that amount of space, could be charged, but very few accounting analyses go into that degree of refinement.

It is a small part of the plant total area and, as I say, in most places, it is unwalled, it is out in the open.

Q Your building expense is one of the costs of doing business at the O'Hare branch, is it not, sir?

A Yes.

Q And as I understand the testimony here, the prime function of the O'Hare branch was to serve as a distribution center for sales in a particular area. Is that not correct, sir?

A Yes.

Q You have not included it in the building expense in any other distribution function that I can find in your accounting and it does not appear at any place in your truck-loading expense. Is that not correct, sir?

A It doesn't appear in truck-loading expense and as for the other part of your question, I said I would have to check on it.

Q Would storage play any part in the loading expense in connection with the distribution of products, sir?

A Yes, of course, storage plays a part in distribution.

Q Sir, I would like to hand you another account from R-A & P Exhibit 71, ledger account No. 723-4, which the chart of accounts would identify as storage at the O'Hare branch or office.

MR. FALLS: Could I have a moment until I get that before me, John?

MR. MATHIAS: Your Honor, I am going to strike that last question for the moment.

I will get back to that sheet later.

By Mr. Mathias:

Q To return to R-A & P X-142 for identification and Attachment 5-C and the underlying ledger cards which have been taken from Respondent A & P Exhibits 71, referring to the first page of the ledger sheets as they appear in your exhibit; you have noted that you have subtracted a credit of $998.44 to obtain the loading expense which you post on Attachment 5-C in your computations.

Do you know the nature of this $998.44 credit, Mr. Havemeyer?

A According to the subaccount definitions, it is a labor transfer.

Q Would this be atypical or an atypical credit in your opinion, Mr. Havemeyer?

A Do you mean as to the fact that there is a credit or as to the amount?

full pallet so that full pallets could be loaded on the truck?

A Yes.

Q You state you have made allowance for that in your calculations.

Where do we find this allowance in your calculations, sir?

A It is inherent in the calculation because the same type of activity is necessary for nonprivate label items.

Q And upon what do you base that testimony, sir?

A I believe it is also within Mr. Bergler's testimony, but if we are going to get into that in any detail, then, I will have to look at it.

MR. MATHIAS: Do you have a copy of Mr. Bergler's testimony?

MR. FALLS: I don't think we have one here.

MR. CURNIN: We do not.

MR. MATHIAS: I don't think it would be necessary to double check it.

By Mr. Mathias:

Q It is your impression of the record that this was done for both private label and for the Borden label. Is that your testimony?

A Yes and furthermore, there is mixing of products in almost any dairy plant on pallets or skids.

Q Is it your impression from the record that the mixing of pallets of all Borden label was necessary to the same degree that it was necessary to mix pallets containing private label?

A Yes, because you had a greater variety of nonprivate-label items with more chance of having to mix.

There are only 11 private label items and there are more nonprivate label items, and since the mixing more typically occurs in the small volume items, there is a greater chance for such mixing to occur in the nonprivate-label items.

Q A & P was purchasing nonprivate-label items as well as the private-label items, was it not, sir?

A Yes.

Q And that would be in addition to the 11 products covered by the private label throughout the entire period of time that we are dealing here.

After they had switched entirely to private label on those 11 items, they were still purchasing some of the other byproducts under the Borden label. Were they not, sir?

A Yes, but the nonprivate-label purchases were declining.

Q So that when you stated that this mixing was taken into account in your calculations, it was this manner in which you took it into account, that you just considered it as being equal for all products. Is that correct, sir?

A Yes.

When we say equal, there is a matter of degree, of course. And we cannot tell at this time, nor has anyone testified as to

A Yes.

Q Did you seek ledger sheets for the rest of the year or for other months?

A I am not certain of the answer to that, Mr. Mathias, on this account because at times we did look for other information, not just with respect to this account but in general we looked for other information to support or corroborate, and I can't answer that question specifically with respect to this.

Q Did you make an analysis of the account ledger sheets in Exhibit No. 71 with those in any other month during this time period of 1965 to determine whether or not the credits or the debits were typical of the operations of the O'Hare branch or the other location numbers under the particular expense and location listed?

A Well, again I have to give the same kind of generalized answer. I did not work on all the details because of the magnitude of the analysis. I know what my instructions were and what our intent was. Now what was done specifically on Account 723-23 for May 1965 I could not venture.

Q Were those instructions in written form, Mr. Havemeyer?

A No, sir.

JUDGE HINKES: May I interrupt for just a moment?

You said, Mr. Havemeyer, that with respect to the credits shown in this account you assumed that Borden knew what it was doing in running the account and you simply accepted their of the June figures, referring back to Attachment IVC, as I recall your testimony yesterday, there were two sets of figures used on that attachment, one dealing with transport milk and the other dealing with regular, or milk that was delivered to branches, and in one instance you deducted the June expenses and in the other you did not, is that not correct, sir?

MR. FALLS: What attachment was that?

MR. MATHIAS: IVC.

THE WITNESS: I think when we discussed that, I didn't say that we did it. In fact, you asked me whose handwriting it was. For example, on Account 703-74 where there is a deduction for June entries, as I have mentioned before, in general on these ledger cards the handwritten numbers were not entered by us. The handwritten descriptions of subaccounts were in general written in by us.

I am not sure whose handwriting that is on that 3,842.13 ~~302,41[illegible]~~, but we had a reason for either accepting that deduction or for making that deduction.

By Mr. Mathias:

Q But in any event the one figure, the figure for the automotive expense on deliveries to the branches included June entries whereas the transport milk account in that instance did not include the June entries; is that not correct, sir?

A That's right.

Q Now going back to the worksheet which is entitled "Derivation is representative of a broader region which would include O'Hare, O'Hare being a large part of it, but we have the automotive expense on all 42 wholesale routes in the area excluding Hammon.

Q So you figured this on an overall basis for the entire metropolitan region?

A Yes.

Q $16.20 then would relate to the entire region excluding Hammond?

A Yes.

Q Now, sir, going back to your previous worksheet, "Derivation of Route Day Costs, Wholesale Delivery," the first five lines there deal with the -- at least with your interpretation of the specific expenses of the O'Hare branch, is thatnot correct, sir?

A Yes.

Q Now, sir, you stated that you did not have the expenses for the automotive expenses at the O'Hare branch level, but only on the regional level, is that correct, sir?

A I don't think I said quite that. I think I said that we had expenses available for the entire metropolitan region and if we could get that data, then it would be preferable because occasionally trucks are transferred from one branch to another in the dairy business and in any case, I felt that getting the automotive expense for the region would be more representative be O'Hare bulk routes, automotive expense.

Q And there is also a ledger sheet which I have previously referred to for location 723 Account No. 71, which is marked "Automotive Expense" and would appear by the table of accounts to apply to O'Hare wholesale accounts; is that not correct, sir?

A Yes.

Q Now, I would return to my previous question that if you had used the figure from the ledger card and divided it by the number of wholesale route days which you have on your original worksheet "Derivation of Route Day Costs" of 560, you would have arrived at a higher cost per route day than -- higher automotive cost per route day than that which you have arrived at on this sheet; is that correct, sir?

A It would have been a lower cost, but I cannot remember the logical reason for believing that that was not ---

Q A lower cost or a higher cost, sir?

A If you divide, I think it was approximately a $10,000 expenditre by 560 route days, there would be a higher cost per route day than $18.20.

Q It would be approximately $18.90 per route day, would it not, sir?

A That sounds about right. I didn't do the arithmetic. Yet I feel there is a logic which I can't recall now, which I want to review with my staff for feeling that that wasn't comparable time observations upon which they are based.

JUDGE HINKES: Let me ask you, Mr. Havemeyer -- if those time studies are not available, how did you compile this exhibit?

THE WITNESS: Because once the time studies have the data taken from them, there is no further need for them because we have done the analysis necessary to develop the standards from the raw data.

JUDGE HINKES: You kept your conclusions, in other words, and that is the document from which this exhibit is taken?

THE WITNESS: That is right, sir, and this is typical of what we have done for many years.

MR. FALLS: If I may, I think it would be helpful if I marked, for identification, as the next A&P Exhibit, the material we have supplied to Government counsel, which consists of all of the material relating to these time standards which still exists in the Case & Company files, so you can see exactly what that consists of and it does set out the figures from which these numbers were calculated.

MR. MATHIAS: I would object to that. These figures -- of course, I can't object to the marking, but I would like to note that the documents to which Mr. Falls is referring have been referred to as only a part of the time studies upon which Mr. Havemeyer has based his conclusions.

[redacted]

THE WITNESS: It was prepared by us in preparation of -- in advance of any litigation developing what would be a cost -- what would be a price and discount schedule that could be used in commercial business, in the dairy business, and in Chicago, and if these be available for any litigation that might result.

JUDGE HINKES: This was done long before this particular case arose, I gather?

THE WITNESS: Yes.

JUDGE HINKES: It was based upon studies you had made of some company other than Borden, presumably?

THE WITNESS: Yes, that is right.

JUDGE HINKES: What is this document's connection, therefore, with Attachment 7 of 142?

THE WITNESS: Attachment 6, I think you mean.

JUDGE HINKES: 6, perhaps.

THE WITNESS: This is a further breakdown of the time standards which are shown on these 2 pages, which are in attachment 6.

MR. FALLS: May I make one comment. I did want to respond to one point Mr. Mathias said. He seemed to characterize this as though this is a cost study. This serves a very narrow purpose. All this does is to develop standard as to how long it takes a man to do a certain thing.

JUDGE HINKES: Yes, I understand. What I am getting to is this study, which attempts to tell us how long it takes an employee to do certain functions, was developed for some particular occasion that has no necessary relationship to Borden. What I want to know, what is that relationship, if any, and I think Mr. Havemeyer ought to be able to tell us.

THE WITNESS: In the first place, it was developed in Chicago, on store routes, delivering to a variety of stores in Chicago.

JUDGE HINKES: What does that necessarily have to do with Borden?

THE WITNESS: Because Borden was operating store routes and the manner in which we developed the time standards, namely, what I described as an elementary approach, makes it entirely possible to adapt the standards to the conditions at hand. Even if these standards were developed in the 50's, although they were later reviewed and updated, the very fact they are of an elementary nature, enables us to put together the elements that will conform to the conditions at a particular time that a study is being made. If the standards had not been developed in elemental fashion, we could not have done so. That is why I think, frankly, our approach is unique.

JUDGE HINKES: I don't quite follow you, now. Take any one of these items which is like an item contained on 142.

47 Lets see if we can find one just by -- Pick up Empties -- you have got an item on 153 for picking up empties with a certain .43 for the first case and .23 for each additional. Is that minutes or what?

THE WITNESS: That is minutes.

JUDGE HINKES: Very well. Now, how does that help us determine whether the figures you have entered on this document are correct, that is, on 142?

THE WITNESS: What page on 142 are you referring to?

JUDGE HINKES: I am looking at the first of 2 pages for delivery time standards ~~supplied~~ applied to estimate serving time. I see that picking up item takes .23 minutes, for limited service. The same for full service.

What is the connection between those figures and the figures you show on 153, or is there any connection?

THE WITNESS: There is a very direct connection. The two page document, in the documentation package, is taken directly from the data in front of you on A&P 153, and I could not, at this moment -- but I could easily, given, perhaps, an hour, show exactly how the data goes from 153 to the two page set of standards.

JUDGE HINKES: Are you saying all of the figures used in 142, for delivery time standards are lifted intact from the figures contained on 153?

THE WITNESS: Lifted and rearranged for more convenience in use.

MR. MATHIAS: What about the limited time service, sir. I see nothing mentioned in 153 concerning limited service times and yet they appear on the standards as they appear in 142?

THE WITNESS: The grouping of the elements are done to conform to the conditions, that is, if we are concerned with conditions of limited service, we then put together the time values of those elements which are performed in the limited service type of delivery. On the other hand, in the case of full service delivery, we want other elements plus some of those which were used in the previous group from 153, and put them together to represent the kind of work which a man does when he makes a so-called full service delivery.

JUDGE HINKES: Then, if I understand what you are saying, you really don't have a time study here, do you? What you have is a calculation of what the time should have been.

THE WITNESS: This is a -- I don't know how to respond to that, sir.

JUDGE HINKES: What you are saying is you have rearranged certain elements of time to come up with a figure you think is correct?

THE WITNESS: Yes, and this is a technique well known and accepted in many types of industries, sir.

JUDGE HINKES: Perhaps so. What is your justification for that rearrangement which you call a time study?

THE WITNESS: Because --

JUDGE HINKES: If you make a time study, it seems to me somebody has to observe how long it takes to pick up a case of empties?

THE WITNESS: Yes. That is exactly what we did to develop the standard on 153 for picking up a case.

JUDGE HINKES: You say that is not necessarily the figure you used on 142?

THE WITNESS: It is the figure we used on 142. It is just that 142 is a rearrangement of the standards on 153 for more convenience in use. I can demonstrate there is a direct and immediate ~~time~~ tie between the 2.

MR. MATHIAS: This would worry me far more than -- it worries me far more now than it did before the explanation began. We have a period of time which it is quite apparent the product mix was not even the same as it was during the period of time we are concerned with in that glass was a very much more substantial item in the product mix, and obviously handling glass takes more time than handling other empty cases so this is going to cause problems in these standards. Further, it is still quite apparent that we have no knowledge of the comparability of the stores that we are dealing with between this study and the stores on the Borden routes. I might note that it is quite evident to anyone that after World War II there was a continuous decline in the number of stores and a continuous development of more and more supermarkets, and this continued through the '50's and well into the '60's and it is still going on. The further you go along, the more difference there is in the type of stores we are dealing with.

JUDGE HINKES: Let me ask Mr. Havemeyer. When was this study made, 153?

THE WITNESS: It was originally made in 1949 and 1950. It was later updated in the mid-50's, and was later reviewed and confirmed in the early 60's.

JUDGE HINKES: The figures on 153 then represent what -- 49, 50, 60 -- what?

THE WITNESS: They represent 1949 and a confirmation over at least a 13 year period that they are still applicable. I would like to take Mr. Mathias's objection point and show why this is valuable and useful in this case. For example, he says that the study was made at a time when there was more product in glass than there is now. The very reason for using and developing elemental time standards is to reflect that fact, that is, if it does take more time to handle a case of empties and a case of empties occurs when you have glass bottles because they are returned as empty bottles. Then you apply

JUDGE HINKES: You said 124.

MR. MATHIAS: I assumed it came next in line. What is the exhibit number?

MR. FALLS: That one comes somewhat later in the marking, I believe, because we had a hiatus -- it is 140.

MR. MATHIAS: Complaint counsel stands corrected. I am informed correctly it is RAPX 140. However, this is the 7th attachment in your list of flow charts in this same series of exhibits, is it not, sir?

THE WITNESS: Yes.

By Mr. Mathias:

Q Referring to RAPX 142 through 152, the flow charts in these exhibits, which is entitled Attachment VII, and the accompanying calculations and attachments, would correspond to the flow chart which has been identified as A&P Exhibit 140. Is that correct, sir?

A Yes, sir.

Q Now, sir, in the upper left hand corner, the first box on this flow chart is entitled, Average Cost Per Point, Per Borden Company Records, and lists a cost of $.0151. There is a notation in a box attached, CX-54B. Is that the source of that figure, sir?

A Yes, it is.

Q Would you indicate where, on Commission Exhibit 54B we can find those figures?

merchandising expense and other income and deductions.

Q Now, sir, having subtracted that amount, you come to a box entitled, Cost of Items Completely Or Partially Applicable to A&P Private Label Business, and I take it this is the mere subtraction of the first box, or the second box from the first box. Is that correct, sir?

A That is right.

Q And then there is a notation on the line in the flow chart stating, Less, and you have, in the next box, Items Partially Applicable to A&P Private Label Business. Can you explain to us, sir, how this figure which appears to be $.0061 was obtained?

A It was obtained in 3 or 4 separate steps.

Q All right, sir, lets take the first step, then. I take it those are the 3 or 4 separate steps you are referring to -- are those which are listed in several boxes in the lower left hand corner of this flow chart and which are joined by a common line and an arrow to the box entitled, Items Partially Applicable to A&P Private Label Business. Is that correct, sir?

A That is right.

Q Would the first step be your determination of the Branch Clerical Expense?

A Yes.

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Q Could you explain for us just how you have arrived at this figure?

A Well, as already read by me from Exhibit 54B, the cost for the average point for Branch Clerical Expense is $.0010, and we have allocated that between Pirvate Label and Non Private Label Business, on the basis of delivery tickets since the principal function of Branch Clerical is the handling of these delivery tickets, or one of the significant functions at least of Branch Clerical is the handling of delivery tickets. If you continue toward the back of the book to the first typewritten page, you will see the description of that. This is actually 2 pages which are headed, Distribution of Anticipated Branch Clerical Cost on Basis of Delivery Tickets Processed, and Proportion of Line Items Used for Private Label.

Q Now, that page begins, counting the flow sheet, 5 pages back in Attachment VII. Is that correct, sir?

A Yes.

Q Will you explain for us, now, sir, just how you have analyzed this Branch Clerical expense?

A Well, we are trying to determine here what proportion of the delivery tickets -- of the total delivery tickets are there for the private label business. You will notice, on line 1 of that typed sheet, a reference to CX-~~44~~42D, which is the 5th page following that page.

Q Now, that would be a document entitled, The Borden Company

Central Division Data Re A&P Sales, Fluid Milk Based on 6th Period Ended June 26. Is that correct?

A Yes.

Q And dated August 16, 1965?

A Yes.

Q I see you have arrived at a percentage figure of 55.7 percent. Could you tell us how you arrived at that figure?

A Yes. It is taken directly from that document.

Q Would you tell us what figures were used, sir?

A On the first line it says, Chicago Metropolitan and the extreme right hand figure is 55.7 percent, and the heading on that is Percent of A&P sales to -- I am sorry -- Percent of A&P Sales, subheading to Wholesale Route Sales for the Chicago Metropolitan Area.

Q And you have taken this 55.7 percent from CX-42D and brought it over to the first page of this calculation sheet. Is that correct, sir?

A Yes.

Q Now, what is the next step -- I see the number 2 here -- you have taken the $.0010 figure for Branch Clerical Cost Per Point?

A Yes.

Q What was your next step in your analysis of this cost item?

A All right. We are going through a series of proportions based upon data in these various documents to arrive at the percent of Delivery Tickets that are there for the private label business and as line 3 on this typewritten sheet, it indicates, Analysis of Chicago and Suburbs, Borden Billings to A&P, May 1965, and it shows 11 private label items which would account for 75 percent of A&P point --

Q Where do we find that figure, sir?

A You get it from Chicago and Suburbs billings for these 2 months.

Q Where has the calculation been made? Where can we find it in this package, sir?

A It is not in that package.

Q Has that analysis been committed to paper, sir?

A No. I don't think so. I think that was -- we had the billings alongside at our desk with a calculator and worked it out and posted the 75 percent.

Q Let me get the mechanical procedure that was involved here, then. Just how did you determine this 75 percent figure from the May and September 1965 billings?

A Well, if you take the point volume for the private label items which appears on those billings for -- just a minute. If you refer to the billings and take the quantity of the items which were later taken in private label, and compare the point volume of those items to the total point volume, you come up with approximately 75 percent.

Q Sir, which billings -- can you tell us exactly what billings from May and September 1965, were used in this analysis?

A Well, it is before the weeks occurring in those months. There are weekly billings, as you recall.

Q I do recall, sir, but I know that quite frequently the weekly billings do not conform exactly to the period of the month, and I need to know in order to check your analysis, the exact week ending billings to which you are referring here.

A I can't answer off the top of my head, Mr. Mathias. I would have to tell you later.

Q In the event Complaint Counsel do not have copies of those particular billings, Complaint Counsel would need to be supplied with copies, too.

I am not sure since we did not use these in any of our calculations -- I am not sure whether or not these billings are available to complaint counsel.

A All right.

Q Now, you, through this calculation, you have come up with a percentage figure of 75 percent of the A&P point volume being represented by the proposed private label items during these 2 periods of time. First of all, do you recall whether that was an average of those 2 period of time or did it work out that way for each of the 2 periods of time?

A It was an average of those 2 -- May and September are reasonably representative months of the year.

Q Do you recall how they compared in percentage?

A Individually?

Q Yes.

A No, I don't.

Q Now, you state May and September are representative months. Did you make a study of the sales volumes on an annual basis to determine that these were representative months?

A Well, first, it is generally known in --

Q I would like my question answered as to whether or not he made an analysis of Borden's sales. If he wishes to explai afterwards, that is fine. I would like to know if there was any analysis made of Borden's billings to A&P in the Chicago and Suburbs on an annual basis, to determine whether or not those 2 months were representative months?

A To answer that question -- I think so, but to confirm it I will have to check with my staff.

Q In other words, you don't know whether such a study was made, at this point?

A I am not certain but I think so. Secondly, the part I was starting off to answer, first, is that May and September are recognized as representative months of the year, as far as volume and mix is concerned.

Q Can you give us a reference to an authority on that point, sir?

A Myself.

Q No. 4, the next item on this sheet, listed as an Analysis of Chicago and Suburbs, Borden Billings to A&P March 1966, A&P's 11 Private Label Items required only 11 of the 38 codes required for billing. Could you explain what you mean here, sir, and how this applies to the earlier steps of your analysis?

A Yes. In processing billings, entries are made for individual items and the extensions are made for individual items and eventually these are carried forward into various extensions and totals. If you refer to the billings for Chicago and Suburbs for March 1966 -- and I understand you have a copy of them -- there are 38 lined codes or lined items on a bill, and there were 11 private label items.

Q What bearing does this have on your calculations, up to this point?

A So far, no calculations have been made. You will see it down below when you get to the computation section.

Q This is merely a step?

A A step.

Q In this analysis of the March 1966 A&P billings, were there other products on these summary billings to A&P?

A Yes.

Q So there were more than 11 lines on the billing used in the billing to A&P, were there not, sir?

A Yes. I thought I had said that.

Q But only 11 of those lines were private label items. Is that the point here, sir?

A Yes.

Q Now, sir, the next item, item no. 5, you have as Item 12 of documents Case & Company would use -- I take it you are referring to RAPX-74. Is that correct, sir?

A That is right.

Q And I believe that appears one page behind this typewritten, this two page typewritten work sheet. Is that correct, sir?

A Yes.

Q What use was made of this in your calculations?

A Data was taken from this, as will be seen on page 2, to develop the ratio of 30 percent.

Q What data was taken from this, sir?

A All right. Please turn to sheet 2. First, at the top, the top batch of information talks about schools. We are now going to determine delivery tickets for schools; as indicated on A&P Exhibit 74, there were 4 school routes, and there were 79 schools on these routes, and now, on the 20 regular routes, if you look on RAPX 74, midway down the page, opposite the word, Total, and under the column listing for Schools, you will find 24. Incidentally, the difference between the 24, at that point, and the total number of schools of 103, are the 79 schools you see opposite the word, 4 school routes, on the typewritten sheet. That is a total then of 103 schools, for a 39 week school year.

Q Where do you determine the number of 79 schools for the 4 school routes, sir?

A Subtract 24 from 103. 103 is shown as the total number of schools and 24 of those schools were on the regular routes. The school routes of which there were 4 -- that is 79 schools. There is a total of --

Q What have you done with that figure?

A Multiplied that by the 39 week school year, 5 deliveries per week -- 103 times 39 times 5 is 20,085 annual delivery tickets.

Q What was your next step in the analysis of those delivery tickets, sir.

A So long as we are referring to A&P Exhibit 74, let us now refer to the 4th calculationqu this typewritten sheet -- the one which says, A&P Stores 528 stops times 52 weeks.

Q All right, sir.

A The 528 is the product of multiplying 6 by 88 and on A&P Exhibit 74, about midway down the page, opposite the word, total, and under the 4th column, which is entitled, Number of Chain Stores, A&P, you will find 88.

Q Now, sir, in each of those instances we are using figures for the O'Hare Branch. Is that correct, sir?

A Yes. 88 stores times 6 deliveries per week times 52 weeks is 27,456.

Q All right, sir. Now, what other analysis did you make?

A The second of those 4 lines, sheet 2 of this typewritten work sheet --

Q To interrupt for a moment -- I take it sheet 2 is actually the analysis you were referring to in step no. 5 on sheet 1. Is that correct?

A Yes, that is right.

Q The second step, now.

A It is entitled, Other Non-Store, 104 Stops times 52 weeks. I now refer you to Attachment VI of this same Exhibit, where we have already developed that figure; counting the flow chart as page 1, please turn to page 3.

Q All right.

A You and I are not looking at the same sheet, Mr. Mathias. Counting the flow chart as no. 1 --

Q I am sorry. Starting at Attachment VI -- I started at Attachment VII.

A The title of the page is Derivation of Route Day and Deliveries Per Route Day by Class of Customer, O'Hare Wholesale, 5th Period 1965.

Q And, sir, from what document was this analysis made?

A Excuse me just a minute. I want to show the Judge what page we are on.

Under the section about the middle of the page, which is headed, Non-Store Customers, I now want to determine the other of Non-Store Customers, other than schools, inasmuch as we have already determined the number of school stops and school delivery tickets, so I refer you to the figure opposite the word, Subtotal of 224, and the figure opposite the word, Schools 120. Subtract the 120 from the 224, and you have 104.

Q Sir, we are not dealing with the same number of schools, now, for the 5th period of 1965 that we were on the previous calculation of schools in attachment VII here in. Is that correct, sir? The words -- In Attachment VII, where we were calculating the number of annual delivery tickets for schools, we were dealing with a figure of 103 schools in that instance. Is that not correct, sir?

A Yes.

Q Now, in this particular instance, we are not dealing with all of those schools, are we, sir?

A Yes, we are. The data on this page, in Attachment VI, that we are referring to, was also developed from A&P Exhibit 74.

Q Sir, referring to this last sheet, the derivation of route days that you have just referred us to in connection with Attachment VI, under the total number of schools in this section, entitled, Non-Store Customers, you were dealing with only 24 schools. Is that not correct, sir?

A We are dealing with -- lets be sure we are on the same page. The page headed, Derivation of Route Days --

Q And Deliveries of Route Days Per Class of Customer?

A Right.

Q Going to the middle of the page, I thought you were referring to, under the heading, Non-Store Customers, you stated you were listing, as I understood it, the non-store customers, including schools, which you had already computed?

A Yes. I should have been a little more exact in my reading of the caption of the section we are on. The general heading of that section is Number of Customers Served by the 20 Regular Wholesale Routes, and they serve, in addition to their stores, restaurants and delicatessens, institutions, factories, golf clubs and schools, and there are 24 schools which you will also find in A&P Exhibit ~~24~~ 74.

When we multiply 24 schools times ~~8~~ 5 stops a week, we have 120 stops, and so, 120 school stops on a regular wholesale routes subtracted from 224 total stops on regular wholesale routes gives us the number of non-store stops on regular wholesale routes. That difference being 104, and you will find that then back in Attachment VII.

Q Now, sir, going back to this last sheet to which you have referred in Attachment 6, you have restaurants and delicatessens 8, with the estimated stops per week 6, I take it there is, on the O'Hare routes, 8 restaurants and delicatessens served and you estimate each was served on the basis of 6 stops per week. Is that correct?

A Yes, that is typical.

Q And Institutions you have listed 6 institutions as being served by the O'Hare routes in May of 1965, and you estimate 6 stops per week for the institutions -- Is that correct, sir?

A That is right.

Q Now, sir, I notice you have 3 factory cafeterias listed and estimated stops per week as 5. Where would we find the information that these factory cafeterias were served on a 5 day per week basis?

A Factory cafeterias typically operate 5 days per week, and therefore they receive service 5 days per week.

Q Did you make any study of the individual factories involved here to determine whether or not they operate on a 5 or 6 day basis?

A Since I wasn't on those routes in 1965, no, but I have ridden routes which serve factories in the Chicago area.

Q But you have no personal knowledge as to those 3 factory cafeterias?

A That is right.

Q Now, in connection with the one golf club, you have a total of one, and you estimate the stops per week there as 5 days per week. Do you have personal knowledge as to the number of days per week this customer was served?

A Yes.

Q And what is the basis for that?

A In one of the route books, the golf club appears and it shows 5 days per week.

Q Now, sir, based on this information, you have come up with a figure of 104 stops per week for non-store customers other than schools. Is that correct, sir?

A Yes.

Q And you have transferred that to sheet 2 of this work sheet back in Attachment 7. Is that correct?

A Yes.

Q Then, what have you done with that, sir?

A 104 stops times 52 weeks equals 5,408 delivery tickets. Now, going to the next line, Other Store Customers, and I refer you again to Attachment VI and to the same sheet which is headed, Derivation of Route Days and Deliveries Per Route Day by Class of Customer, O'Hare Wholesale, 5th Period 1965 -- we are now referring to the segment down below called Other Stores, and the data for this is taken from A&P Exhibit 74.

Q And you have merely multiplied the number of stores here by the estimated stops per week, which is in each instance 6. Is that right, sir?

A That is right.

Q And you have come up with a total of how many stops per week?

A If you add up the figures, starting with 66 through ~~400~~ 348, you get 696.

Q And then what have you done with that information, sir?

A 696 has been transferred to sheet 2 of 2 that we have been referring to in Attachment VII -- that is multiplied by 52 weeks to get the annual number of delivery tickets at 36,192.

Q Now, sir, going back to sheet 1 of your --

A There is one remaining step.

Q Excuse me.

A Sheet 2 of 2, when you add up all of the annual delivery tickets for the 4 segments there, you have 89,141 and the ratio of the 4 components to that total shows that the A&P stores comprised 30 percent of the total number of tickets so handled.

Q How have you used that information, sir, on page 1 of this 2 page work sheet in Attachment VII?

A First, we have transferred it, as indicated in the text of Item 5 on that sheet. Now, we will start the computations shown down below and eventually this figure of 30 percent will be worked in there. Computation A shows that -- now, all of the data down here is drawn from the documentary data mentioned above, so in Item A, we have the proportion of

A&P sales to Borden's Chicago Non-Bulk Wholesale, and we have the proportion of Private Label Points, so multiplying those 2 gives us 41.8 percent of the total points.

Now, in Item B, we have already shown the derivation of the 30 percent, which is the number of A&P tickets to the total number of tickets at O'Hare, and I have demonstrated in Item 4(a) above that only 11/38ths of the number of line items so processed offered private lable -- 30 percent times 11/38ths equlas 8.7 percent of clerical costs. In line C the proportion of the clerical cost to the proportion of total points is the proportion of the average branch clerical cost per point which is the 8.7 percent divided by 41.8 percent. That equals 20.8 percent.

On line D, I have made an assumption, one, based on experience, of an allowance for seasonal factors or variations in customer characteristics of 3 to 4 percent, and since we are working with approximations here, I raised it to 4.2 percent, so that, plus the 20.8 percent, equals 25 percent. I have determined, then, that the proportion of Branch Clerical Cost, based upon the line items and delivery tickets processed would be 25 percent of the Branch Clerical Cost would be devoted towrads processing these items.

Q What information would we look to in the record to find that Branch Clerical Cost was solely related to the processing of these delivery tickets?

box is entitled Credit Collection Expense $.0004 times 75 percent, and this again is indicated to be a result of analysis of sales tickets. Is that correct, sir?

A Yes.

Q And could you tell us sir how that figure was arrived at?

A From the same percentage we have referred to in the case of the Branch Clerical Expense.

Q And where was the $.0004 obtained, sir?

A On page -- excuse me -- Commission Exhibit 54B.

Q Referring, sir, to Commission Exhibit 54B, that figure again is an average figure and is not a figure developed from O'Hare Branch Accounting Records. Is that correct, sir?

A That is right.

Q And the 75 percent that you have applied to that figure in this box has been arrived at through the same analysis of delivery tickets which you used in the previous analysis of Branch Clerical Expense. Is that correct, sir?

A That is right.

Q Now, again, sir, in connection with those customers listed in your work sheet, in which you came up with this 75 percent figure, a substantial number of those customers were daily cash paying customers, were they not, sir?

A Yes.

Q Now, the next box in the lower left hand column is

Q Now, you have taken this amount from Commission Exhibit 4 from this sheet entitled, Central Division, Wisconsin Region, and that figure appearing under Private Label is $1,135.32. Is that correct, sir?

A Yes..

Q How have you used that to arrive at this 90 percent deduction?

A I refer you to the page immediately ~~preceding~~ following the CX-4 excerpt, that is CX-42D, and you will find, at the bottom, $1,135.32 divided by four million points, equals .00028 per point.

Q And where do you obtain the four million points, sir?

A From the data above that on the same page.

Q What is that data, sir? Could you read it to us?

A Yes. There is 3,300,000 points in the Chicago Metropolitan Region determined by multiplying wholesale route sales of 6,027,418 by the percentage of A&P sales to wholesale route sales of 55.7 percent, and similarly, for Eastern Iowa, Central Illinois Region, we have wholesale route sales of $2,580,393 and, as indicated by the Borden document, A&P sales were 28.8 percent of wholesale route sales. Multiplying those 2 figures gives us 700,000 points for a total of four million points..

Q Now, sir, this $1,135 figure which you have applied to this four million points was taken from the Wisconsin Region

A All right. I can't here.

Q Are the maps available here in the room, sir?

JUDGE HINKES: Are you saying, without the maps, you do not know?

THE WITNESS: I am not sure which portion of Illinois falls within the Pekin Plant Region, and this region.

JUDGE HINKES: Then, are you saying you don't know?

THE WITNESS: Well, I don't know without looking at the maps, sir.

JUDGE HINKES: Very well. I don't think we have to bother with the maps unless you are looking now to find out what areas are involved.

MR. MATHIAS: No. I just wanted to find out whether the witness knew. I think the record will be crystal clear on the point as far as the evidence is concerned.

JUDGE HINKES: Very well.

By Mr. Mathias:

Q How have you used this $.00028 figure in your computations in connection with the General Sales Overhead Calculations?

A Well, as shown at the bottom of page 42D, and repeated on the typed page, this is indicated as $.00028, which is 8 percent of $.0035.

Q What is $.0035, sir?

A That is the average cost per point for this function as taken from CX-54B.

Q Again, sir, do you know whether or not that is an average figure?

A Yes.

Q So it would not necessarily apply exactly at this level to the O'Hare Branch. Is that correct, sir?

A What do you mean "at this level" -- that exact amount?

Q Figure, this amount?

A No, that is an average for a broader area.

Q Now, you have arrived at this 8 percent figure. What use have you made of it, sir?

A Excuse me just a minute. I would like to make a note.

Q I asked you, now that you have arrived at this 8 percent figure, how have you used that?

A We approximated by using 10 percent. In Picayune, you could say we even had a slight disadvantage in the development of this cost for A&P, but anyway, we approximated that to 10 percent -- made a 90 percent reduction instead of a 92 percent reduction, and applied that to the $~~.0025~~ ,0035.

Q I notice right above this Region Sales Overhead, Attachment VII, there is a calculation ~~$.1135~~ $1,135, divided by 4,100,000. That seems to differ a little from the calculation made on the page 2 pages back which is marked Commission Exhibit 42D?

A That is a mistype.

Q On the typed sheet, it should be 4,000,000?

A Yes.

Q So that then is just transferring your calculation up to the typed page. Is that correct, sir?

A Yes.

Q So now, having arrived at this 90 percent figure, the effect of this is that only 10 percent of this $.0035 per point General Sales Overhead will be applied to A&P sales. Is that correct, sir?

A Right.

Q I see it is about 5 minutes of 1:00 or about 10 to 1:00 Let me see just how much is involved in this next box. I don't know it really will do us much good to go to it if it is going to take any time at all.

JUDGE HINKES: Of course, I have to depend on your judgment on these matters.

By Mr. Mathias:

Q Maybe I better go on to it, sir, because I don't see any data in here, and that may create some problems.

Referring to the next box in the lower left hand corner of this flow chart, which is A&P Exhibit 140, there is a 2 box series, the first of which is entitled, Analysis of Petty Cash Product Waste, with an arrow going into another box, Other Delivery Costs, and $.0020 times 95 percent.

Now, to go to that first box, Analysis of Petty Cash Produce Waste, where will we find that analysis, sir, in RAPX 142?

A Well, the figure of $.0020 comes from CX-54B, opposite the caption ~~of the~~ Other Delivery Costs, and the box to the left of that, on the flow chart, should appropriately have a comma or an and sign after the words, Petty Cash. Analysis of Petty Cash and Product Waste.

Q Where will we find those analyses, sir?

A I will describe one analysis to you and refer you to the documentation for the other. By the terms of the private label contract, there were to be no route returns, and the product waste is the route returns.

Q That was no product returns other than leakers and product spoilage within date. Is that correct, sir?

A That is right.

Q Leakers or product spoiling within date would be product waste, would they not, sir?

A Yes, and that is a small portion of the route returns, a very small portion.

Q This is your supposition. Is that correct, sir?

A Observations.

Q Have you made any analysis of the product waste of the Borden Company during the period 1965, May 1965?

A No, I was not there at that time and their accounting records don't indicate that degree of detail.

Q Did you analyze their product waste for any other period of time?

product waste in other delivery costs.

Q How do you know that, sir?

A I can't recall the detail on that, now.

Q What proportion of the .0020 is represented by product waste, sir?

A I would have to go back and make an analysis of that.

Q Have you ever made such an analysis, sir?

A My staff probably has.

Q But you do not know whether such an analysis has been made?

A No.

Q And it does not appear in RAPX 142?

A Well, I mentioned before that product waste does appear in the ledger cards which we have seen in RAPX 142.

Q Amount of product waste, if any, included within this $.0020, Other Delivery Cost, has not been analyzed in any documents in RAPX 142 or related exhibits 143 through 152. Is that correct, sir?

A It is not in any of this documentation in those exhibits.

Q So your answer is, yes, to that then, there is no such analysis in these exhibits, sir?

A I guess it is yes, there is none.

Q Now, sir, you also list an Analysis of Petty Cash. Where do we find that in RAPX 142, or any other exhibits?

A In copies of the ledger cards attached for account 723-23.

in connection with another section of your Exhibit 142, in which we noted that there were 3 Petty Cash Entries, one for in the name of J. J. Pergler for $34.23; one which appears to be MacNamara, petty cash for $550, and one to Pergler, petty cash $14.84. Is that correct, sir?

A Yes, and then there are other entries opposite Pergler.

Q None of those other entries indicate Petty Cash. Is that correct, sir?

A They don't state Petty Cash, no.

Q Now, what use has been made of those figures,, sir? Where would we find your analysis of these figures?

A Well, Mr. Pergler testified that these Petty Cash disbursements were not spent on behalf of the A&P business.

Q Well, sir, accepting for the moment that Mr. Pergler's testimony is to that effect, what use have you then made of those 3 figures which are labeled Petty Cash?

A I have made use of the fact there is Petty Cash Disbursement. I have made use of Mr. Pergler's statement to say that Other Delivery Costs would not be chargeable to the A&P business. On the other hand, recognizing there might be some slight amount, and recognizing the point we mentioned before there are occasionally leakers, or other spoiled merchandise going into a store which the Borden Company would accept responsibility for, I did not deduct 100 percent of Other Delivery Costs, but deducted 95 percent, giving some recognition to the small amount of --

Q Subaccount 50, is it not, sir?

A Yes.

Q Isn't it true that all of the subaccounts listed under 50, looking at the first page of this account 723-23, I see there is an accumulation of those subaccount 50 figures which appears to be $2,024.18. Is that correct, sir?

A Yes.

Q Now, how much of that did you consider as being not applicable to A&P?

A None.

Q In other words, you included --

A All not applicable.

Q And yet all of the entries under subaccount 50 -- only 3 are marked Petty Cash. Is that not correct, sir?

A Yes, but with the exception of one, the others are also marked, Pergler.

Q They are marked Pergler, but there is no note of Petty Cash -- excuse me -- going back one moment. I see more than one item marked with a subaccount 50 that are not marked Pergler. There are several, at the very least. That is at quick glance, but, in any event --

A There is one for $13 and some cents.

Q But in any event -- excuse me --

A There is one other one for $24.00. I think those are the only 2.

Q Whether or not they are the only 2, there are only 3 accounts totaling less than $600, which are marked specifically Petty Cash. Is that not correct, sir?

A That is right, assuming your arithmetic is right.

Q Now, sir, what information, what evidence do you have from the record, as to the amount of petty cash disbursements which appear in the figure $.0020 on Commission Exhibit 54B?

A I can't recall.

Q Now, sir, taking these 4 blocks at the lower left hand corner of your flow chart, which you have calculated the Branch Clerical Expense which you allege is not applicable to A&P, and as being 75 percent of one mill[illegible] per unit -- is that not correct?

A Yes.

Q And the credit collection expense which you allege is not applicable to A&P private label business, which you set at 75 percent of 400ths of a cent per unit -- is that correct, sir?

A Yes.

Q And the general sales overhead experience which you calculate as 90 percent, non-applicable to A&P private label business, and the other delivery costs, which you have calculated as being 95 percent, non-applicable to A&P business -- you have accumulated these figures, which you have this calculation as far as A&P is concerned. Is that correct?

A No.

JUDGE HINKES: I think you are a little confused, Mr. Mathias. The 5 percent being attributed may have included a hundred percent of Mr. Tarr's salary.

THE WITNESS: 10 percent.

JUDGE HINKES: The 10 percent, I should say.

MR. MATHIAS: There is no evidence of that.

JUDGE HINKES: I say, may have. The fact that 90 percent of a general grouping that included Mr. Tarr's salary was deducted does not mean that any one item had 90 percent so attributed.

By Mr. Mathias:

Q Now, Mr. Havemeyer, in your calculations, has any recognition been given to the fact that the greater portion of Mr. Tarr's salary was attributable to serving the A&P account?

A That is difficult to answer with a yes or no because it is a grouping of costs which is a group of a number of individual cost items, one of which would be Mr. Tarr.

Q But have you made any special recognition in any of your calculations of the amount of time and the portion of the salary of Mr. Tarr that was allocable to the A&P account?

A No.

Q Now, sir, where in this -- in your calculation of

27 costs -- would we find the time and salary of Mr. Milone, Mr. Minkler, Mr. Goss and other Headquarters Personnel who spent a great deal of their time in the years 1964 through 1967 at least in negotiations with A&P over this account?

A I can't specify exactly where it is but it would be one of this group of expenses.

Q It would appear somewhere on Attachment VII?

A Yes.

Q Was there any special recognition taken, any special calculation made of the amount of time spent by those officials of the Borden Company directly on the A&P business during this time period?

A No special analysis of those individuals but the CX-54B indicates that their salaries and time are in this area, within the expenses incorporated within this attachment.

Q They are in there someplace?

A Yes.

Q But there has been no specific analysis of how much of their time and salary was applicable to the A&P business alone. Is that correct, sir?

A That is correct.

Q Sir, I believe we are at a good stopping off point for today, and I would recommend that -- one moment, sir.

Mr. Havemeyer, I do have one additional question in this regard. I would refer you to the ledger sheet, MR. MATHIAS: The cost study was rejected, was it not?

THE WITNESS: Yes, but not by reason of the --

MR. MATHIAS: But it did deal with the classificatio of customers, didn't it, sir?

THE WITNESS: Which had nothing to do with the time standards -- yes.

MR. MATHIAS: I would like to note this is the witness's opinion of the findings of U. S. v. Borden, but obviously, if the classification of customers is important, as the Supreme Court found in U. S. v. Borden, we cannot determine it from a summary document such as this and this, the witness admits, in that case, the Justice Department was provided with all of this underlying data and were allowed to go through the underlying cost data to determine just the points complaint counsel has mentioned before and raise their objections which were ultimately accepted by the court and it is quite necessary and we cannot make that type of examination in this instance.

MR. FALLS: I don't accept Mr. Mathias's characterization of what weight is to be given that decision. The ruling there has nothing to do with the validity or --

JUDGE HINKES: You are preparing a memorandum on this particular documents, are you not, Mr. Falls?

MR. FALLS: Yes.

Q So this was the basis for your selection of the O'Hare Branch?

A That is not the only basis.

I think we have covered this point before. I will try to go over it again.

O'Hare was a significant, substantial factor in the total wholesale business. Also, O'Hare had in its record data which we could use inasmuch as we wanted to avoid averaging as much as possible and relate the cost analysis to the specifics of a situation. These were two basic reasons,I would say, for including O'Hare.

Q But you made no analysis of the data from the O'Hare Branch as compared to other branches of the Borden Company to determine whether or not the experiences there were typical of those other branches?

A We certainly made no analysis in this degree of detail. It would be extremely costly.

Q What analysis did you make, if you recall, sir?

A Isn't that I have been describing for the past hour?

Q Well, sir, I have asked you if you have compared the sales data for the O'Hare Branch with any of the other branches of the Borden Company for March of 1966.

A I am not sure of the answer to that.

If it requires an answer, I will have to check on it.

Q Do you know at this time whether or not such a comparison had originally used an O'Hare branch document dated November 1965 and then subsequently replaced it with a document of similar nature for May of '65, it appeared on the November '65 document there had been a change in number of routes between March of 1965 and November of 1965. Do you know exactly when that change in number of routes occurred, sir?

MR. FALLS: Which document are you referring to now? I think the witness should have the document before him if he is to be asked about it.

MR. MATHIAS: If the witness rest, Your Honor.

THE WITNESS: I remember that there was a change.

By Mr. Mathias:

Q There was a change sometime before November of '65?

A Yes.

Q Did you check to see when this change occurred?

A No.

Q Did you check to see if there had been any changes in the number of routes between March of '65 and May of '65?

A I don't recall, Mr. Mathias.

Q Do you know if Borden was still serving Eagle stores in May of 1965?

A I don't know now. My staff may remember.

Q But you have no present knowledge?

A No.

JUDGE HINKES: Did your calculations include those

A No, my staff did.

Q And did you draft this particular work sheet at which we are now looking, sir?

A Well, I was certainly part of the drafting of it. I don't have the answer to the question on that. An analysis must have been made ---

Q It is not ---

A It is not here now and as I say, I am at a loss to answer your question. I don't know if it was an intermediate work sheet which was written or if it was done with a calculator. Of the many details here, this is one I can't answer your question.

MR. MATHIAS: Your Honor, again we are faced with an underlying computation that has not been supplied to complaint counsel and that gives us a great deal of difficulty in analyzing the data that appears here.

The witness is not even able to testify as to whether or not such an analysis exists and in what form it exists, sir.

JUDGE HINKES: Well, the important thing I believe rests on one question only and that is, Mr. Havemeyer, can you now explain and rationalize this breakdown?

THE WITNESS: Yes, I can do that.

JUDGE HINKES: All right. Tell us how.

THE WITNESS: By multiplying the quantity of items on the billing summary for the fifth period of 1965.

By Mr. Mathias:

Q Do you know the meaning of the term "Tetra Pac"?

A Yes. It is a parametal shaped container.

Q Do you know the size? In other words, what is it, a pint, half pint, quart?

A I think that is half pint or smaller.

Q Do you have any information in the record which would indicate its size, sir?

A Well, there is so much in the record, I don't remember what would be there on that point.

Q Do you know from your own personal knowledge the size and the product involved with this Tetra Pac?

A No. I would have to check that with my staff.

Q So at this time you cannot give us an answer, sir?

A That is right.

Q Now, sir, you stated before that the analysis of these route books, insofar as the schools and other non-store points were concerned may have been made by a calculator.

Q When you are referring to a calculator are you referring to the electric hand calculators where the number just appears, or one in which the paper comes out and there is a permanent record of your calculation?

A Well, it is an old Friedan, one where the number just appears but which will give you cumulatives on your multiplier and multiplican.

in the first line of Column C.

Now, dropping down to the category "other stores," I note that no matter what category the other stores fit in, that is, from those various categories starting with 99 or less up to 800 plus points per day, you assign the exact same number of points per case of 21.6.

How was this figure arrived at, sir?

A Well, inasmuch as we analyzed three routes rather than 17 routes, we felt that there was not sufficient data to be certain of a variation of the points per case by size of store.

Q Which three routes did you analyze, sir?

A Was it 3-W, 18-W, and 14-W?

Q So the analysis by which you came up with this figure would also appear on this spread work sheet which is a part of Attachment 6?

A It should.

Q Turning to that work sheet, where would we find the detail for this calculation, sir?

A Total points -- oh, I am on this long spread sheet.

Q Yes, sir.

A Total points and total cases for the two groups of independent stores, that is those taking limited service and those taking full service.

Q Just how do you calculate out this 21.6 figure?

A I take it you are discussing the data in this portion in

A I can only guess at this time. I still think that was the proper method.

Q In other words it should have been obtained by dividing the 34,000 figure by 1,552?

A Yes.

Q And then you would have arrived at 22 points per case figure; is that correct, sir?

A Yes.

Q Now, sir ---

A It may be because at the time we were working with these route books, unfortunately I guess your staff needed them, and sometimes they went back and forth and that plus the fact that they were difficult to read, and I know we had to rework them, if you will. Maybe a mistake crept in there.

Q And now, sir, according to your computations, according to your work sheet which is the last work sheet in Attachment 6, each of the stores other than A&P, no matter which of these categories they fall in, that is 99 points or less per day purchases, up through 300-plus points per day purchases, each of these are being credited with purchasing the same product mix; is that correct, sir?

A Well, the same points per case.

Q Well, that comes down to the same products mix basically, doesn't it, sir?

A I don't think so.

Q Well, what would go into the points per case then, sir?

A The number of items of the various types of merchandise taken divided by the number of items per case.

Q Then you would have to consider the number of, say, half pints that went into a case, the number of gallon cartons that went into a case.

A Yes, but I can conceive of the same number of points per case and a different product mix, or I can conceive of the same product mix -- no, I can't conceive of the same product mix, but I can conceive of the same points per case for different products. I am not sure if I contradicted myself.

Let me illustrate. One customer takes all gallons or say all half gallons and 12 of those to a case, 12 times 2 is 24. Another customer takes all quarts, 24 to a case, 24 points, still 24 points per case. Different product mix, but the same points per case.

Q Sir, would you expect that each and everyone of these stores and each and everyone of these categories would take the same number of points per case per average delivery day?

A No, I would expect it to be different, but the data was not there unless you went through a tremendous analysis.

But, on the other hand, I don't think it would vary very much. For example, even when you look at, for example, look at the Borden label under A&P, it is 19, compared to the 21.6 and the private label is 25.8, and even under the extremes of quart was added to the 10.8431 for the skim milk quart, and their sum is 21.4469, and you will find then the same figure 21.4469 in the second column of data for the skim milk quart and for the buttermilk quart.

Q So that you have used this same estimated average points per loaded case in connection with each of these items?

A That is right.

Q And assumed that in each case these items were combined to make a more full case than could be done if they were being delivered on their own.

A Well I would like to change those words. I am not assuming that there would always be a combination of buttermilk quart containers and skim milk quart containers, but rather the fact that these two containers did represent a chance for combination.

Store number 22 or 84 which is the first one in the list of printouts attached to this may not on every day have combined skim milk quarts and buttermilk quarts, but I am trying to give recognition to the fact that there are these two products where we know that we don't always fill the case and at least those two represent the opportunity to fill or partially fill a case.

Q The figures for these two products in the first column represent an average figure for the 14 stores, is that not correct, sir?

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A Yes.

Q So that any individual store within here might not order this number of points per case on a typical day, is that correct?

A That is right. On a particular day any particular store which ordered a few quarts of skim milk, it might possibly be combined with half gallons of 2 percent or it might even be combined with homogenized paper gallon.

As you can see on the two percent half gallon line there is also opportunity on the average for putting more merchandise in those cases. So this is not intended to be precise in the sense that skim quarts would always be combined with butter milk quarts for each store each day, but rather recognition of the fact that these two products on the average filled less than half a case and in one way or another they would either -- excuse me.

In one way or the other the case they partially occupied would be filled or partially filled with something else or conversely they would go into other partially filled cases.

Q Now, sir, I can only see two other products which you appear to have treated the same way and that appears to be the buttermilk half gallon and the chocolate quart, is that correct, sir?

A Yes.

Q In this instance again you have assumed that there would be one quart of chocolate milk added to a case of half gallons, is that it, or two quarts of chocolate milk added to a case of half gallons, is that correct, sir?

A Well, first to correct your figure, it would be four quarts.

Q Oh, excuse me. You are right sir.

A Well again I ask you to consider the word "assume" in the way I have just described it. I am not assuming that you would always combine a quart of chocolate with a half gallon of buttermilk.

Q And now but through adding these two together you have come up with the estimated average points per loaded case which you have arrived at in the second column for each of these products of 17.6470, is that correct, sir?

A Yes.

Q And in the final column I take it the maximum possible points per case listed there is taken directly from the A&P Exhibit which gives the number of units of each of these containers contained in a single case, is that correct, sir?

A Yes.

Q Now, sir, these various A&P stores that were involved in your calculations here were located on three separate routes, is that not correct, sir?

A Yes.

Q And your average points ordered per case then basically

Q To clarify that, it is true, is it not, that the half-gallon container is one of the most popular containers in the whole line?

A That is right. As I recall, it is almost 50 percent of the total line.

Q So that a great number of those are handled?

A Right.

Q And I think in your earlier testimony, in going through the information you had compiled from the route books with respect to the deliveries of the 14 stores you studied, you found only one instance out of many, many days and many, many stores, did you not, when the quantity of half-gallon deliveries was not exactly divisible by the number of units in the case?

A There may have been more than one, perhaps two, but very, very few.

Q So that the average came out almost exactly to having a full case each time?

A Yes.

Q Now, the gallon container is much less popular, is that not right?

A That is right.

Q So that the incidence of or the necessity of having cases that are not completely full is a more frequent occurrence?

A That is right, and that is what is reflected in the figures of Column A to Attachment 5-E; so, accordingly, the loading

Now, of course, I was not at the Woodstock plant at the time of its start-up operations in 1965, so I cannot speak with as much specificity on this point as I could on the case of loading and delivery cost relationship between the two packages. But there is a professionally done study which goes through various detailed analyses and ends up with a relationship of approximately 2 point 4 to 1, and I have ended up with a relationship of 2 point 5 to 1.

Q So that this essential relationship between the processing cost for gallon and half-gallon is traceable in large part to the figures developed by Haskins and Sells through their study?

A That is right.

Q Now, Mr. Havemeyer, on the basis of your experience over the years in milk processing and the study of the milk industry and so on, do you now have any opinion as to what reasons or what causes might have been behind this ratio? In other words, why, in the matter of plant operations, would one find that the processing of a gallon of paper costs something over twice as much as the processing of a half-gallon paper?

MR. MATHIAS: Your Honor, I would object to this question because it is not clear as to which cost Mr. Falls is referring to in his question, the so-called Milwaukee cost or the Woodstock cost.

MR. FALLS: I am asking him generally, in processing plants generally, are there any additions which would explain this kind of a ratio of processing cost.

JUDGE HINKES: The witness may answer.

THE WITNESS: Yes; there can be several reasons. One is due to the relative speed of the filling equipment. There is separate equipment filling the gallon containers and filling the half-gallon containers. And one is not used for the other. If the relative filling speeds are different, this will affect the cost.

As a matter of fact, around the mid sixties, the gallon paper container was relatively new. There were problems with what they called the blanks, the cartons themselves, which come from suppliers. The filling equipment for the gallon container was relatively slow as compared to the half-gallon container.

There were problems in filling aside from the slowness itself. There were problems -- well, the machine would stop or paper jam or suddenly leakers would develop; it wouldn't seal properly.

So first, at the equipment itself, for several reasons the gallon container was -- well, what will I call it -- inefficient, relatively high cost as compared to the half-gallon. This was even one of the reasons why the plastic, the all-plastic container was able to break into markets as the gallon level. The gallon paper was just not as effective or as efficient a package.

In fact, you can also see the consumer preference was such that, in the work sheet we had looked at in Attachment 2-H, there weren't very many of these gallon containers shipped out of Woodstock -- 189,000 for the fifth period of '65 as compared to over 1,200,000 of the half-gallon containers -- and, after all, Borden would only fill and ship what the market requires; and, for whatever the reason, the consumer preference, they just didn't ship nearly as many gallon containers as half-gallon containers.

While there is not enough documentary evidence here to substantiate the following point, nevertheless it is likely, in my judgment, that the effective utilization of the gallon filling line was not nearly as high as the effect of utilization of the half-gallon filling line.

There is a ratio there of more than six to one, but there were two gallon fillers, according to the equipment list, and three half-gallon fillers, so there is a ratio of three to two, one and a half to one, on the number of machines but a ratio of more than six to one on the number of units shipped.

By Mr. Falls:

Q I understand that point, Mr. Havemeyer; in other words, there were two gallon fillers and the cost of operating those two gallon fillers was spread over 189,258 units; and, with respect to the half-gallon, there were only three machines but the cost of operating those three machines was spread over

1,214,314?

MR. MATHIAS: Your Honor, there have been references here to a number of machines. Complaint counsel would appreciate a reference to that information.

THE WITNESS: Yes. I think A and P 40, which is the proposal to build Woodstock --

By Mr. Falls:

Q Could you indicate the page there, Mr. Havemeyer? Do you have it in front of you?

A No, I don't have it in front of me.

On page 25 of A and PX 40 there is an equipment list for the filler, and this is Section 10, which is entitled "Equipment Detail." On page 25, we find that there are two gallon Pure-Pak fillers and there are three one-half gallon Pure-Pak fillers.

MR. MATHIAS: This was the proposal, sir?

THE WITNESS: That is right.

MR. FALLS: I think we have finished that line of questioning, your Honor. I don't know whether you prefer to have Mr. Mathias have some recross on that now or later.

JUDGE HINKES: Mr. Mathias, would you care to have any recross at this time?

MR. MATHIAS: It might be helpful if I ask a couple of questions on this particular point just for clarification and keep it in the same place in the record. I am not prepared to make an entire voir dire.

RECROSS-EXAMINATION

By Mr. Mathias:

Q Referring to R - A and P Exhibit 40, this page 25 to which you have referred, and assuming that the proposal as originally drafted was put into effect, can you tell, from looking at this proposal, the relative speed of the gallon and half-gallon Pure-Pak fillers that are referred to here, sir?

A No. No; that is not detailed.

Q There are also four Canco fillers listed down here. Do you know what they were to be used for, sir, what size units?

A I cannot tell from this, and I am not sure if that is indicated in the record. But we do know that we are talking about these Pure-Pak containers for the private label.

Q You do know there were some Pure-Pak --

A Yes.

Q -- fillers then in the plant as eventually built?

A Yes.

Q But you cannot tell from this what the relative speed of those fillers were, is that correct, sir?

A That is right.

Q Now, sir, as I gather from your comment, your ultimate ratio in Woodstock depends, to some degree, on the fact that you started out with a certain ratio in Milwaukee and built from that; is that correct, sir?

A Yes.

Q Now, do you know, from your own personal knowledge, the relative efficiency of the gallon Pure-Pak fillers or the gallon fillers in the Wisconsin plants as compared to the Woodstock plant?

A No, I don't remember now. I was in the Milwaukee plant at one time, as I indicated previously, but I don't recall what the relative efficiency was.

Q And were you ever in the Madison plant, sir?

A No.

Q So you wouldn't know anything about their equipment?

A No.

Q Do you have any indication in the record, sir, that the Woodstock plant had any trouble with its filling equipment during these initial stages at its operations?

A Not in the record. I was speaking from general knowledge before.

Q Sir, referring to the costs in Milwaukee as compared to Woodstock, at the half-gallon level the ultimate calculated cost in Column 11 for Woodstock is quite similar to that of Milwaukee. There is less than a mil difference, whereas in the quart units there is approximately three mils difference between your calculated cost at Woodstock and that which Haskins and Sells calculated for the Wisconsin plants. And at a gallon level, there is again over three mils difference between the two plants. Can you explain this difference, sir? Why is there so much difference in the gallon and quart units as compared to the half-gallon unit?

A Well, first, I think your arithmetic is a little wrong. I think you said between a half-gallon and quart there is a three-mil difference.

Q No; between the same size units in the two areas, between the quart unit in Milwaukee as calculated by Haskins and Sells for the Wisconsin plants and the quart unit that you have calculated for the Woodstock plant.

A Yes.

Q There is almost three mils difference or a little better than two mils?

A No; it is one and a half mils, isn't it?

Q But between the half-gallon units in those two areas, there is less than a mil difference, and at the gallon unit level, there is better than three mils difference between that which Haskins and Sells calculated in Wisconsin and which you calculated at Woodstock for the gallon unit.

In other words, the ratios between these various products seems to change somewhat from that calculated by Haskins and Sells in Wisconsin and that which you calculated in Woodstock. What factors would account for this in your calculation, sir?

A Well, first recall that all of those units have an increased cost at Woodstock as compared to Milwaukee. If there is an increase -- and let's take a hypothetical figure to make the arithmetic easy -- if there is an increase of a mil on the quart package, there will more likely be an increase of more than one mil for the half-gallon level on the gallon package.

Q Here, then, you would expect also an increase of more than one mil in the half-gallon unit, would you not, sir, if, in fact, your ratio goes down when you go from the quart to the half-gallon?

A Yes, if you were using a general average, that would be true; but you may recall that, for example, we examined the Ex-Cell-O least cost in some detail; rather than use a general averaging method, we determined that more specifically for individual packages.

Q And this was based upon your study of the Ex-Cell-O lease cost, is that correct?

A That is right.

Q I thought you said, sir, that you had broken out the Ex-Cell-O lease cost from the other production costs because this was the way it was done by Haskins and Sells in Milwaukee and that you wanted to conduct your study along the same line, breaking out the machine-rental costs.

A Yes.

Q Well, then, wasn't there a break-out in Milwaukee of the Ex-Cell-O lease cost, too?

A Yes.

Q Well, then, I don't see how that would explain the variations in the ratios between the quart and half-gallon in Woodstock as compared to that ratio in Milwaukee if you are starting out with the Milwaukee unit cost as the basis of your calculations.

A Well, notice that, in our Column 11, as you trace the various legends back, we include the Ex-Cell-O lease cost. So it does have an effect on this relationship.

Q But the Milwaukee unit cost included an Ex-Cell-O lease cost broken out on a unit basis, too, did it not, sir?

A They have separate from the container cost, so they had it in their processing cost as well as we did. Now, the details of their study were not available to us, so I cannot tell you how they determined the Ex-Cell-O lease cost.

Q Was it your opinion, then, sir, that the main difference in the ratios between the unit costs, between quart, half-gallon, and gallon units in your calculation of Woodstock cost as compared to those calculated for the Wisconsin plants would be found in the manner in which you have allocated the Ex-Cell-O lease cost across the various product lines?

A No. Because we analyzed the cost in three pieces and we are hypothesizing here a bit because the details of the Milwaukee cost analysis are not available to me, and I was generalizing as to why there could be reasons for differences.

Q Well, this is one reason, then -- the manner in which you have allocated the Ex-Cell-O lease costs across the various

unit container sizes involved here -- is that correct, sir?

A Yes.

Q Now, are there any other differences that you can point out that might account for a variation in the computed costs here between Wisconsin and Woodstock?

A Well, I have to generalize because, as I said, the specifics are not available. The manning of the filling lines is a reason or possible reason; the amount of maintenance cost is another reason. Any costs which are allocated on a space basis would be another reason inasmuch as you have got two gallon fillers and three half-gallon fillers; we don't know the manning on these lines and, depending upon management's preference, to illustrate, if there were troubles in keeping the gallon filler going continually because of problems such as good seals or if there were jams with the newer type of equipment on the half-gallon fillers, management could have said, on the one hand, "All right, we will keep our manning cost low and have a high percentage of interruption." On the other hand, management could have said, for whatever reason, "We don't want a high percentage of interruption on the gallon filler and we will have more men on the line so that when trouble occurs we can clear it faster."

There are a number of reasons why this cost could be higher at the gallon as compared to the half-gallon.

Q But you were not personally aware of the manning problems or the machine-breakdown problems or the leakage problems at either the Wisconsin plant or the Woodstock plant, is that correct, sir?

A No; only in general, from general observation.

Q And you are not personally aware of whether or not management had these problems, are you, sir?

A Well, management in general had these problems, as I said before.

Q But you have no personal knowledge of any management problems at Woodstock?

A No.

Q Or at the Wisconsin plants?

A Well, I did at one time at the Wisconsin plant, but I did not take that into consideration in this because I did not remember that well.

Q And that was at the Milwaukee plant, not the Madison plant?

A Yes, although I don't think the so-called Madison plant was included in the Haskins and Sells production costs.

Q Now, however, Mr. Havemeyer, in your calculations starting with the Milwaukee unit cost and arriving, over at Column 11, your computation of Woodstock unit costs, you have gone through certain accounting procedures, allocating various costs.

Now, other than the possible difference in allocation of Ex-Cell-O lease cost, can you explain to us which of your other allocations herein might account specifically for these

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differences in ratio between the costs of these three products -- the gallon, half-gallon, and quart -- as between the Wisconsin plants and the Woodstock plant as they were both calculated in this exhibit?

A Well, you had two other elements there, one being what we would call "all other" and another being labor cost.

Q In other words, you are referring now to Column 4, the nonlabor cost?

A Column 5.

Q And that is obtained through multiplying Column 4 by Column 1, is that correct, sir?

A No.

Q Column 4 by -- oh, yes; I see -- by the point 86755?

A Yes, sir.

Q Now, those figures in Column 4 were the figures taken from Column 5 in Respondent A and P Exhibit 65, is that correct, sir?

A That is right.

MR. MATHIAS: Your Honor, complaint counsel have no other voir dire at this point.

FURTHER REDIRECT EXAMINATION

By Mr. Falls:

Q One further question on this subject. Apart from any particular plant, Mr. Havemeyer, do you have any general knowledge as to the relative speed of half-gallon lines and gallon lines in the mid sixties?

different subject matter.

FURTHER REDIRECT EXAMINATION

By Mr. Falls:

Q Mr. Havemeyer, there have been considerable discussions about this Ex-Cell-O machine rental and your method of allocating it. Now, then, you prepared an alternate method of allocation in an effort to determine what effect that might have?

A Yes, I did.

MR. FALLS: Let me have this marked. What is the next A and P exhibit number?

JUDGE HINKES: 154.

MR. FALLS: I would like to have marked as A and P Exhibit 154 a three-page document headed at the top of the first page "Re: Allocation of Ex-Cell-O Machine Rental."

(The document referred to was marked Respondent A and P's Exhibit 154 for identification.)

By Mr. Falls:

Q Let me ask you, Mr. Havemeyer, to explain what that document shows.

MR. MATHIAS: Your Honor, before there is any explanation, I wonder if complaint counsel could have a few-minutes break to at least look through this exhibit. I think the witness has been on for about an hour anyhow.

JUDGE HINKES: Yes, that might be advisable, so we will take a short recess now.

(A short recess was taken.)

JUDGE HINKES: On the record.

By Mr. Falls:

Q Mr. Havemeyer, would you proceed, then, to explain what is reflected in A and P Exhibit 154?

A Yes. We used another method of allocating the Pure-Pak rental costs, which, as shown in our report, were $10,480.90 for the month. We allocated this in this work sheet -- is this 154?

Q 154.

A Yes. In this work sheet, we allocated it on the basis of the number of points put up in Pure-Pak containers, and that can be found on the last sheet in this package of three sheets, and the data for that comes from a long work sheet in Attachment 3-A, towards the back of that section where we listed all of the items which were packaged and shipped by Woodstock in the fifth period of 1965.

And, by tabulating the items on the third page of A and PX 154, doing some grouping there just so we don't repeat as long a sheet and multiplying by the number of points per unit for each of those groups, we came out with the point volume in the third column of this third page, and that totals 6,309,601 points.

I brought this figure over to the first page and divided the $10,480.90 by the 6,309,601 points to get a cost of dollar sign point 001661 per point. I now applied that to each of the 11 private-label items by multiplying the cost per point by the number of points for each of the private-label items, and that is shown under the heading "Cost per Unit, Alternate Method."

For example, for the homogenized gallon container, the figure of point 006644 is four times the cost of points shown on line 3. I subtracted from that the figures shown in the second column, headed "Cost per Unit, Original Method," which figures will be found on Attachment 2-B in A and P Exhibits 142 to 152, where that figure appears for each of the 11 private-label items. Now, I have the difference in the right-hand column.

So there is the difference under the two methods for each of those 11 items. And, as you can see, in some cases the original method is slightly higher, in other cases slightly lower than this alternate method.

Now I refer you to the second page of the set, where I carried out the arithmetic as it is carried out in the final cost summary of A and P Exhibit 142 to 152. It may be recalled, in Attachment 8, that one of those work sheets -- more specifically it is the second sheet in Attachment 8 -- shows the percent of total volume of each of those 11 private-label items and, since the final Attachment 8 is expressed in terms of margin per points, I worked with this on a point-volume basis, so the figure in the first column of page 2 of this A and PX 154 is a transfer from the first page, the second column. It is the figure in the first column divided by the appropriate number of points, and I have multiplied the figures in the second column by the percentage of the total volume that each item represents to the total.

In other words, the homogenized gallon is point 000031 multiplied by 17 point 03 percent equals dollar sign point 0000052. Some of the figures are of the negative value, those in brackets, and some are positive. And I get the algabraic sum of these 11 figures in the last column. We find that the weighted cost difference and, in this case, an additional cost under this method, is dollar sign point 0000992.

So that shows the small effect of another method of allocating the Pure-Pak rental costs, although I don't believe it is as correct a method because it is of an averaging nature, and I believe that the method I did originally -- we tried to determine the costs of the Pure-Pak lease for each of the specific products rather than just average it over some basis. I believe my original method is a superior method.

Q Can you relate this additional cost of 0000992 to Attachment 8 and see how it affects the overall calculation?

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A Well, on Attachment 8 it shows that the profit per point is $.01728, and that would not be slightly reduced -- excuse me while I work it out.

If I subtract .000099 from the profit per point of $.01736 I have .017261, and if I divide .01726 by the weighted average price per point of .1635 my answer is now 10.5556 percent, 10.56 percent.

MR. FALLS: I have no further questions on this exhibit, Your Honor.

JUDGE HINKES: Are you offering it in evidence?

MR. FALLS: Yes. I guess we really should consider this along with the other things that have been offered. It doesn't necessarily have to have a ruling on that now. It would go in part with the whole package.

JUDGE HINKES: When you say "along with the other," what are you referring to?

MR. FALLS? 139 through 153, this whole group of exhibit relating to the profitability study.

JUDGE HINKES: Yes, I was going to ask you about that, Mr. Falls. We have a number of exhibits which have been identified and have been discussed in that grouping that you are referring to, but then in addition, we have separately 153, which was connected with the original submission.

MR. FALLS: Right.

JUDGE HINKES: Now, 154 and also 65, which yesterday you offered in evidence and on which I raised some questions

Dip and Chip and Yogurt Cartons," none of which are identified as Pure-Pak cartons and which would appear to include the various unit sizes which we have been discussing.

I note, for instance, that under the sour cream there is a half gallon carton listed under that particular heading and lists that 12 are contained in a case and down below there are two other items under the sour cream dip and chip including the 16 and eight ounce items. So, those are the three sour cream items which you have included under Pure-Pak and yet on A&F Exhibit 78 there is no indication of these cartons as Pure-Pak cartons.

A Except the half gallon also appears under the Pure-Pak column.

Q Well, that just has Pure-Pak and has half gallon units listed under it, but under sour cream dip and chip and yogurt cartons, none of those are identified as Pure-Pak; is that not correct, sir?

A That is right.

Q And they do have a separate column for those items; is that not correct, sir?

A Yes.

MR. MATHIAS: One moment, sir. There are a couple of other clarifying questions I would like to ask at this point.

By Mr. Mathias:

Q You have discussed the EX-CELL-O rentals. At this time back in the mid-1960's, isn't it true that the EX-CELL-O rentals were based upon a base machine rental plus a royalty per unit?

A Yes.

Q Now, isn't it also true that that machine rental varied as to the speed and model of the machine?

A It varied with model and I guess it varied with model number, and I was trying to recall if all model numbers or if all speeds were identified by different model numbers, because you could sometimes modify a model to increase its speed or sometimes you could turn it slower. But in general rentals varied by models.

Q All right. Now, the machine rental also varied as to the size of the container used, did it not, sir?

A Yes.

Q Now, the rental also varied on the basis of the age of the machine, did it not, sir?

A I know what the words mean but ---

Q Well, sir, after a period of time wasn't the rental on the machines reduced to zero, approximately five years or more?

A The base rental was reduced.

Q There was some change in the rental?

A There was some change, yes. I don't think the production rental was reduced.

Q There was some change in the rental as the machine aged?

A Yes, sir.

Q Now, sir, when you were referring to the production rental, is this the royalty rates to which you are referring, sir, production royalty rate?

A No, both.

Q There is both a production rental and production royalty?

A Yes. I would prefer base rental and production rental, but I think we are talking about the same thing.

Q Now, the base rental was so much per month, was it not, sir?

A Yes.

Q And that is the one that was reduced as the machine aged?

A Yes. It didn't reduce gradually. I think it stayed at the same level for a period of years and then was reduced.

Q Then was abolished?

A Yes.

Q Now, the production rental was on an annual basis, was it not, sir?

A No, I think it was computed monthly.

Q Are you sure as to whether or not this is the case, sir?

A Well, there might be variations from that but as I recall it was monthly or it might be quarterly but -- no, I think it was monthly.

Q But you are not sure. It may have been on a quarterly or different basis?

A Oh, certainly, that is a function of that clerical department. The cost associated with it would be it would be customary to allocate the cost on the basis of that account.

Q Now, turning to a document that appears in Attachment 7.

MR. MATHIAS: What page is that, Mr. Falls? I can't hear you.

MR. FALLS: I said in Attachment 7. I have not identified the page yet.

By Mr. Falls.

Q Do you recall the calculations reflected in the sheet headed "~~Region~~ Re General Sales OH," which stands for overhead, you testified that you had used a figure of $1,135-and-some-cents which you obtained from a sheet which is the third sheet following the one entitled "~~Region~~ Re General Sales Overhead," which is entitled "Central Division-Wisconsin Region," and that was a figure which you identified as being associated with the selling expenses attributable to that private label program covered by that accounting record, and in your testimony you referred to this figure, this particular cost, I think, as being fixed rather than variable.

What did you mean by the use of the words "fixed" and "variable" in that connection?

A Fixed means that an expense would not increase or decrease proportionately with volume of sales. So, in other words, I would expect that an amount of money, say, $1,135 which I term as fixed that is whether we sell a lot or little in general terms, I would expect to incure that amount of money. That is the nature of fixed.

Q Now, was there any other record that you had available to you which broke down this general overhead and selling expense between private label items and Borden label items?

A No, we did not.

Q Now, let me direct your attention to A&P Exhibit 153 which is time standard material from Case and Company's files.

A Yes, sir.

Q And referring to page 1 of Appendix B in that document -- by the way, before I ask this next question, maybe this would be an appropriate time to substitute the corrected or supplemented A&P Exhibit 153. You recall that question came up and we agreed to do so.

JUDGE HINKES: Very well. I guess we can just withdraw the other one and mark this.

(The corrected copy of Respondent A&P Exhibit 153 was substituted for the original document.)

By Mr. Falls:

Q Referring then to pages 1 and 2 of Appensix B of A&P Exhibit 153, do you recall there was some questioning about the first nine items of time elements listed there, and I think you testified that you did not allocate those items to particular customers?

By Mr. Falls:

Q Mr. Havemeyer, you testified that for various purposes in connection with your study you used data from O'Hare, and I think there was some questioning as to whether you regard it as being representative or why you used that.

How did O'Hare compare with the other branches in size?

A Well, O'Hare was the largest branch I believe by far of the branches serving wholesale points.

May I see A&P Exhibit, I think it is 74 or 75. No, 75 or 76.

(Document handed to witness.)

MR. FOLEY: Here is 76 and 77.

THE WITNESS: If you look at RA&P Exhibit 76 -- do you have it, Mr. Mathias?

MR. MATHIAS: Yes, I do.

THE WITNESS: And starting with the fifth period of '65, that is the first report on which O'Hare appears, it does not appear on the third period of '65 starting with the fifth period, O'Hare's strictly wholesale points as indicated in the first column is 1,878,004, which is larger, which is about twice as large as the next nearest size wholesale branch, namely, Holland Road, which is 957,000.

When we go to the 11th period of '65, O'Hare has a 1,903,000 points and next nearest one as far as wholesale is concerned is Holland Road with 980,000 points, again, roughly two to one, and when we go to the third period of '66, O'Hare has got 1,820,000 and the next largest in size on strictly wholesale points is Holland Road with 974,000 points.

So, O'Hare ~~was~~ has sold twice as many strictly wholesale points as any other branch in the metropolitan region and also sold about three times as much as Hammond Branch regional wholesale routes.

By Mr. Falls:

Q Again turning to a different subject matter, there was some questioning in connection with A&P Exhibit 153 again on page 3 of Appendix B on the fact that the ~~industry~~ description of the customer service element includes providing customers with ice.

Now, when you conducted the time studies that you told us about in 1957 or '58 which reconfirmed the standards that had been previously developed, were the customers on the routes you studied being provided with ise by the dairy company?

A I can't recall any getting ice at that time.

MR. FALLS: Your Honor, I think we had agreed to stop about 1 today, and this might be a good breaking point, if it is all right with you.

JUDGE HINKES: Did yo you have any questions at this time on the subject matters that have been raised, Mr. Mathias?

MR. MATHIAS: Nothing that can't hold over until next week.

JUDGE HINKES: Very well. If that is the case, then

Q Now, you testified, and I think that exhibit shows, that the starting point in your calculation of processing cost in that exhibit was certain Milwaukee costs which are identified there as Milwaukee unit cost, sometimes referred to as the Haskins and Sells unit cost, is that right?

A Yes.

Q Why did you use those as a starting point in the processing-cost calculation?

A It was a study done by a professional firm, using, as far as we could tell, a procedure which is superior to the general averaging of costs, and it was also a source of cost by product, by item.

Q Now, was there any other source from which you could determine a cost per item per product?

A Not in our judgment, no, sir.

Q Do you think it would be appropriate to use the unit cost set out in CX-54?

A No.

Q Why not?

A Well, as we looked at Mr. Malone's data, we noticed some deficiency. I would refer you to CX-54-B and to the lines captioned "Trailer loading; truck loading; delivery cost, man; and delivery cost, truck."

But, as you look at this exhibit, you will notice that, for these four line items -- "Trailer loading; truck loading;

and delivery, man; and delivery, truck" -- that they are determined on a point basis; that is, the half-gallon cost is half of the gallon cost, and the quart cost is half the half-gallon cost.

But, more importantly, when we look at the next-to-last column on the right, which is homogenized gallons in glass as compared to the homogenized gallon in paper, which is the first column on the left, you find that the costs on those lines are identical and, as has been indicated many times throughout my description of our analysis, we do not believe that determining this cost on an average point basis is right, because, in fact, there are more containers of gallons in paper in a case than there are containers of glass; and for those costs to be equal, as indicated on 54-B, is, in our judgment, not right.

Also we have the general impression that there was extensive averaging in Mr. Malone's work; and, as I believe I have indicated several times, to the extent possible and practical, we believe that the costs should be identified by specific product and package size and type.

Q So that Mr. Malone's analysis failed to take account of certain differences in the costs of handling products which you thought should be taken into account?

A That is right.

Q Now turning to another subject matter, you have indicated that you chose May of 1965 as a period for study --

A Yes.

Q -- in your analysis. Why did you pick that particular period?

A Well, there were three reasons; first, as I have indicated before, May is a representative month in the dairy industry, representative of year-round activity. Secondly, it does at least place us in the time frame of the bids; that is, the bids were submitted prior to September 21, with the last one submitted on September 21, so here we are referring to cost data that was available to the Borden Company at the time the bids were prepared.

And, thirdly, we have the impression that Mr. Malone, when he had to make references or explain differences in costs, that he would use May as a month for making those explanations.

Q Now, having chosen May 1965 as a study period, why did you sometimes use data from March of 1965 or March 1966?

A Because unfortunately there was absence of data or records for May 1965. We would, of course, have preferred to have integrated data, if you will, from the same month so that the activities being measured would correspond to the cost data that was available.

You may recall that we have not only used data directly from the Borden ledger cards but we have used supplementary statistics such as number of routes, number of customers, customers by type, number of route days, and various other what I will call the 1949 data, but the numbers you see on the page in front of you are of the 1949 data.

Q Do you have a copy of this plotting you made in 1957 or 1958?

A No, since that was ploted on the same graphs or charts that were used to analyze the 1949 data and, as I described before, that was destroyed, that is not available.

Q Now, sir, going to Attachment 6 and going to the two pages entitled "Delivery time standards applied to estimated serving time, Borden wholesale route customers," in the first page of that document, looking at the fixed time per stop, if we consider only limited service and no collections on the stop, there would be a total of 5 point 21 minutes of fixed time per stop for limited-service customers, is that correct, sir?

A Yes.

Q Now, sir, in connection with some of the questioning last Friday afternoon, Mr. Fallo asked you concerning your work for the various State agencies and some of your other work in connection with the dairy industry, and you indicated that similar time standards had been developed in other areas. One of those that you mentioned was New Jersey.

Now, sir, isn't it true that, in the New Jersey study under the drop-delivery conditions, that you had calculated a standard fixed time per stop of 10 minutes per customer?

A I did not review that for this testimony, so I cannot answer your question. If you will show it to me, I will confirm it or change it, but if that is in our report and that is what you are reading, then I am sure that is what we put in as a standard.

Q So that you did not review each of these studies, then, in connection with answering Mr. Falls' questions on Friday, is that correct, sir?

A Well, I did not review it in the sense of going to each figure in each of the studies but, since I directed the studies, I knew what we did.

Q But in that 10 minutes, don't you find some driving time? Doesn't it say so and this could account for the difference?

MR. FALLS: Mr. Mathias, I think if you are going to ask the witness about a particular document, you really ought to let the witness see it so he can understand what we are talking about.

JUDGE HINKES: The question thus far is whether or not there was such a study made. If there is any further questioning, then, of course, the witness should be allowed to see the document.

MR. MATHIAS: Mark as Commission Exhibit 297 a page of a section which is from a pamphlet entitled "Revised costs created in processing, distributing, and selling milk through stores in New Jersey, December 1965, Case and Company, Inc., 600 Fifth Avenue, New York, New York."

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(The document referred to was marked Commission's Exhibit 297 for identification.)

MR. FALLS: May I see that, please?

(A document was handed to Mr. Falls.)

By Mr. Mathias:

Q I hand you the page I have marked as Commission Exhibit 297 for identification.

JUDGE HINKES: Now, what was your question, Mr. Mathias?

MR. MATHIAS: Would the reporter read it back.

(The record was read by the reporter as requested.)

By Mr. Mathias:

Q I will put the question again. You did allocate, in this particular study, 10 minutes for fixed time for drop-delivery customer per stop, did you not, sir?

A Yes. I am almost certain that one of the reasons for the difference -- in fact, the principal reasons for the difference between that 10 minutes and the five minutes in CX-142 to 152 is driving time inasmuch as back in -- 1965, is this -- we were able to determine the distance traveled, stops per route, and driving time.

Q Can you determine that from looking at that document, that driving time is included in that 10 minutes, sir?

A No, you can't determine it from this, but I do know this is an update of the earlier study which was the original and very large study done for New Jersey.

Q Sir, I am not familiar with the original study. When was the original study done, sir?

A It was started in '62 and, as I recall, it was submitted in March of '63 or thereabouts. I am positive that there was driving time in that fixed time.

Q But you cannot tell from this particular document?

A You can't tell from this document.

Q All right, sir, returning to the variable time on that same page, the variable time allowances mid on that particular page, isn't it true, sir, that, for limited service, the variable time per case allocated in that particular study is approximately about a half-minute per case?

A That is right.

Q And --

MR. EALS: What was that?

MR. MATHIAS: A half-minute per case.

By Mr. Mathias:

Q And in your so-called delivery time standards in Attachment 6 of 162 you derive from the Bowman study, you have come up with a 1 point 053 minutes per case variable time, is that correct, sir?

A That is right.

Q Now, the driving time would have nothing to do with variable time per case, would it, sir?

A No.

JUDGE HINKES: Is that on the limited service you are speaking now?

MR. MATHIAS: Yes, sir; I have spoken of the time he has allocated for the limited service on the time standards set out in R - A and P Exhibit 142.

JUDGE HINKES: I mean, with respect to 297, is that also limited service?

MR. MATHIAS: Yes, sir. That is referred to as "drop delivery."

By Mr. Mathias:

Q Just what were the circumstances under drop delivery as explained in the New Jersey study, sir? Was that dropping it on the sidewalk?

A They were akin to limited service -- I would say: even more limited.

Q Even more limited than that in the present circumstances?

A Yes.

Now, for the New Jersey study, as indicated in 297, we rode routes there and made time observations.

Q You personally rode the routes?

A No; I directed it.

Q Oh, and people from Case and Company rode the routes?

A Yes.

Q So you would expect those times to be more accurate, is

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JUDGE HINKES: Very well.

You may go on, Mr. Falls.

FURTHER REDIRECT EXAMINATION

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By Mr. Falls:

Q Now, Mr. Havemeyer, in addition to the other studies and investigations that you have already testified about, did you undertake a study of Borden's costs serving each of the Borden customers identified in CX 183, the O'Hare Route allegedly injured customers.

A Yes.

Q And did you also analyze the costs, Borden's costs of serving the A-and-P stores on the O'Hare branch for the purpose of making comparisons between these costs and the cost of serving the allegedly injured customer?

A Yes.

Q And to what time period did that study relate?

A March of 1966.

Q And have you prepared a series of charts illustrating the results of that study?

A Yes, I have.

MR. FALLS: I would like to have marked as A-and-P Exhibit 155 a two-page document entitled, "Documents Used by Case and Company in comparing Borden's cost of servicing the non-A-and-P customers identified on the O'Hare branch. CX 183 with Borden's costs of serving A-and-P stores on the O'Hare branch."

(The document referred to was marked Respondent A-and-P's Exhibit 155 for identification)

By Mr. Falls:

Q Let me ask you, Mr. Havemeyer, whether A-and-P Exhibit 155 is in fact a listing of the underlying documents which you used in making the study which you have just referred to?

A Yes, it is.

MR. FALLS: I would like marked as A-and-P Exhibit 156 the sheet entitled, "Summary of Differences in Marketing Costs and Difference in Prices Borden O'Hare Branch, March, 1966, A-and-P Private Label vs. Customer Borden Label."

(The document referred to was marked Respondent A-and-P's Exhibit 156 for identification)

MR. FALLS: And at the same time let me mark as A-and-P Exhibit No. 157 a sheet entitled "Summary of Differences in Marketing Costs and Difference in Prices Borden O'Hare Branch, March, 1966, A-and-P Total vs. Customer Borden Label."

(The document referred to was marked Respondent A-and-P's Exhibit 157 for identification)

By Mr. Falls:

Q Mr. Havemeyer, let me ask you to direct your attention to A-and-P Exhibit 156, and A-and-P Exhibit 157, and ask you were those prepared by you or under your supervision?

A Yes, they were.

Q Would you explain what they show?

A They are the as measured in dollars and cents, and there should be a dollar sign at the head of each column, the discrimination in favor of the A-and-P customer as the allegedly injured customer as compared to A-and-P -- I am sorry, I said that wrong -- discrimination in favor of the Borden allegedly injured customer as compared to A-and-P. More specifically, it represents two differences, that is differences in prices, net prices of the two customers, and differences in the costs of serving them.

JUDGE HINKES: That is per what unit of sale?

THE WITNESS: Per point.

By Mr. Falls:

Q It would be fair to say that what this represents is the difference in price between them and then subtract from that the difference in cost and in each instance the cost difference would be greater, the cost difference was greater than the price difference.

A Yes.

Q How would you explain the difference between A-and-P Exhibit 156 and A-and-P Exhibit 157?

A Yes. I suggest that you underscore two subtitles. On A-and-P 156 underscore at the left-hand side near the top "A-and-P Private Label", and on A-and-PX 157, underscore the words "A-and-P Total".

In the first case it is a comparison of just the private label sales to A-and-P, and in the second case it is of all products, including the Borden label products sold to A-and-P.

Q In each case a comparison was made against all products purchased by the customers from Borden, is that right?

A Yes.

JUDGE HINKES: Let me understand, Mr. Havemeyer. Taking, for example, 156, the A-and-P private label comparisons, and picking out at random let's say Bill's Market, around the middle of the page.

THE WITNESS: Yes, sir.

JUDGE HINKES: And taking as I understand it now these differences that Bill's Market paid something like 14 cents per gallon less than A-and-P was paying?

THE WITNESS: Oh, no, sir. Each figure, let's just take 156. Each figure on 156 shows a difference of differences. That is, there is first a difference in cost in serving A-and-P as compared to Bill's Market, and there is a difference in price between A-and-P and Bill's Market. And the figure of .036799 is the difference between these two differences.

MR. WELLS: Maybe we can illustrate it, Mr. Havemeyer. Let's just take the top one on A-and-P 156, MR. FALLS: And as A-and-P Exhibit No. 161, a chart titled, 'Physical Distribution Costs".

(The document referred to was marked Respondent A-and-P's Exhibit 161 for identification)

FURTHER REDIRECT EXAMINATION (Resumed)

By Mr. Falls:

Q Turning to A-and-P Exhibit 158, is that a document prepared by you or under your supervision?

A Yes, it was.

Q Would you explain what that shows, and I note that we do have a large blow-up of that one on the easel.

MR. MATHIAS: Excuse me, Mr. Falls, would you speak a little louder, please? Was that 158 you referred to?

MR. FALLS: Yes.

THE WITNESS: This chart shows in a flow chart form the manner in which we arrived at conclusions regarding the question of discrimination or justification in the case of the allegedly discriminated customers, and I draw your attention to the very center of the chart which shows that the conclusion comparison was based upon a comparison of differences, that is, a difference in the discount per point between A-and-P and the particular allegedly injured customer under consideration, and a difference in marketing cost per point between the same two customers.

It can be seen in the upper left-hand box for the

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the allegedly injured customer where they are talking about costs that marketing cost includes truck loading, physical delivery, branch clerical, product waste, branch selling expenses, Borden label advertising, Borden label merchandising and overhead. And this was determined for each of the allegedly injured customers and expressed as a cost per point.

The same calculation was performed for delivery to A-and-P stores and expressed as a cost per point for the same functions starting with truck loading and going through to overhead. These two costs expressed as a unit cost per point were subtracted one from the other to get the difference in marketing cost, and then from information on CX 183 and from price lists and so forth we determined the difference in the discount per point between the same two customers and, as I said before, we then compared the difference in discount against the difference in cost, such that if the difference in discount was less than the difference in the marketing cost, then we arrived at the conclusion that there was justification for the prices or as expressed in the tables, the discrimination was in favor of the allegedly discriminated customer.

By Mr. Falls:

Q Mr. Havemeyer, I direct your attention to the box in the lower right-hand corner where you have Borden discount on PL items sold to A-and-P per point, and Borden discount on non-PL items sold to A-and-P per point. Would you indicate why this was used and why it was necessary to consider both of those?

A Yes. We made two types of calculations for each comparison. That is, in the one case we compared the discount on just the private label items sold to A-and-P and compared this to the discount to the "all sales" to the Borden -- excuse me -- to allegedly injured customer, and did that for each customer, and again for each customer we compared the Borden discount on the total sales to A-and-P -- in other words, on the private label items plus the non-private label items -- and again compared this to the discount on the sales to the allegedly injured customer.

Q The results of the comparison which involved only the A-and-P private label items are set out in A-and-P Exhibit 156, is that right?

A I can't hear you.

Q I am sorry. The results of the comparison, using only the A-and-P private label items, are set out in A-and-P Exhibit 156, whereas the results of the comparison using A-and-P's total purchase are set out in A-and-P Exhibit 157?

A That is right, yes.

Q Now, would you turn to A-and-P Exhibit 159 and explain what that shows? On this one we don't have the large blow-up. I don't think we have a large blow-up on this one.

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A Oh, excuse me. All right.

A-and-P Exhibit 159 is not available in the large blow-up, but I would suggest you have A-and-P Exhibit 158 alongside of A-and-P Exhibit 159 and it will illustrate the two comparisons.

This particular illustration is for one of the allegedly injured customers. Namely, Mayfair Foods. Now as indicated in both comparisons we are not changing any of the calculations with regard to cost of discount for Mayfair Foods. In both cases we are comparing an A-and-P situation against the same Mayfair situation, but in the left-hand pair of columns, again I emphasize that that is the private label items only, and in the right-hand pair of columns, that is for all of the private label and Borden label, in other words, the total purchase of A-and-P, and as you go down that list you will notice that in all cases the Mayfair costs in both situations are the same. In other words, there has been no change in the comparison with respect to calculations for Mayfair. The only change in these comparisons is in the case of A-and-P because in one case it is just private label items, and in the other case it is all items.

As indicated in the flow chart, A-and-P Exhibit 158, there are a number of functional costs included in the general category of marketing costs. Again to repeat, they are truck loading, physical delivery, branch clerical, product discount per point has been calculated as .086701.

When we compare the two discount values per point for A-and-P and Mayfair we again come up with a difference of .009001. The difference in the marketing cost of roughly 5 cents and subtracted from the difference in the discount value per point of roughly 1 cent is a net difference in the net difference of marketing cost of a little over 4 cents, again in favor of Mayfair.

So, the conclusion from this calculation is that Mayfair has received -- has been discriminated in favor of. Excuse the English.

Q Or to put it another way, the price advantage that A-and-P received and did not fully reflect the difference in cost between A-and-P and Mayfair?

A That is right.

Q All right. Let's go on then, Mr. Havemeyer, to A-and-P Exhibit 160. From here on now if I understand what you plan to do you plan to take up the individual elements of cost which are reflected on A-and-P Exhibit 159?

A That is right.

Q And we do on A-and-P Exhibit 160 have one of the large blowups on the easel.

A These flow charts are of the same style as those we saw with respect to A-and-P Exhibit 142 through 152, and indicate the general steps involved in determining the

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truck loading cost which was the first cost on the first line indicated on A-and-P Exhibit 159. From Account 723037 for O'Hare in March '66 we have the truck loading expenses for all of the O'Hare business.

By using data and A-and-P Exhibit 76 we were able to allocate a portion of this loading expense which goes against the wholesale business, and that brings it across to the first box in the upper right.

Now we are consistent with the principle followed in the studies we have just completed going through, and that is in the truck loading function the basic unit of activity and of measurement is the case, cases are being handled. So using data from route books, A-and-P Exhibit 74 and 76 and our own calculations, we determine the number of cases which were loaded at O'Hare in March of 1966, and dividing the expenses by the number of cases gives us the truck loading cost per case.

Now for this customer that we are comparing against A-and-P we determine the number of points per case from an analysis of route book entries. Knowing the points per case to this customer, and knowing the truck loading cost per case, we are thus able to determine the truck loading cost per point for this customer. And the figure derived in this manner is the figure which appears or the figures which appear on A-and-PX 159. For A-and-P on the private label program it is .005282, and for Mayfair, .005962, and there are two other figures for A-and-P under its total purchase and for Mayfair.

JUDGE HINKS: Let me ask you, Mr. Havemeyer, can you tell me then in general why Mayfair's loading costs should be higher than A-and-P? What is the factor which created that difference in this chart, do you know offhand?

THE WITNESS: Yes. The fact that there were -- what shall I say? The merchandise which Mayfair ordered and the quantity of each unit of merchandise ordered by Mayfair was such that there were fewer containers per case, or putting it another way, more cases that had to be loaded per point or per hundred points for Mayfair than in the case of A-and-P.

By Mr. Falls:

Q In that connection, Mr. Havemeyer, it may be worth pointing out that if you look at Exhibit 159 and you look at the trucking cost in the first column as compared with the third column, you will see truck loading cost to A-and-P changes depending on whether you use private label only or the total purchase because if I understand what you are saying the points per case for all products taken would be different than if you consider only the private label products.

JUDGE HINKS: It is more or less a situation of splitting up cases then.

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THE WITNESS: That is right. The ordering pattern of the customers. In fact, as you see in the case of A-and-P for its total purchase it appears as though the Borden label items that were ordered were not ordered in full cases or not to the extent that the private label items were ordered in full cases or close to full cases.

JUDGE HINKES: I see.

THE WITNESS: And so it penalized A-and-P in the right-hand set of columns.

By Mr. Falls:

Q All right, Mr. Havemeyer. Would you go forward to A-and-P Exhibit 161.

A That is a flow chart describing the principles and procedures we used in determining the physical distribution cost for a particular customer. I think you will see as we go through this that the principles followed here are the same as those followed in the earlier analysis in A-and-P Exhibit 142-152.

Now here we are concerned again with specific customers, so whether it be A-and-P, or whether it be Mayfair, or any of the other allegedly discriminated customers, we have information concerning in March, 1966 the number of cash collections and the number of deliveries and the volume delivered to this customer. Under volume delivered we have sub-categories of the number of points which were converted to the number of cases, and we also have in the case of Borden label products some volume in glass.

Now, we also have from testimony or stipulation or route book the kind of service which this customer received and it may be recalled from the earlier Exhibits 142-152 that it is basically a limited type service or a full type service, and we have been able to ascertain the type of service which this customer received.

Now the type of service received determines the time which is going to be required to serve that customer, so having determined the type of service received as indicated in the second box you are then able to select the appropriate Case and Company delivery time standard and they are the same time standards that we used in A-and-PX 142 to 1952.

MR. MATHIAS: At this point, Your Honor, in Mr. Havemeyer's explanation, Complaint Counsel would again like to note their objection to the use of the Case and Company so-called time standards in this matter.

JUDGE HINKES: Well, of course, we have not yet had a ruling on the admissibility ---

MR. MATHIAS: No, sir, I just wanted to note my objection. I realize at this time we are not going to get a ruling, but I wanted to be sure that it was clear on the record that Complaint Counsel is objecting to the use of these time standards in this case no matter which exhibit it is in

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connection with, and since there will be other series of exhibits that may use these time standards as well, maybe it would be best to note a continuing objection at this point.

JUDGE HINKES: Yes, I will allow a continuing objection to the use of the documents that have not yet been received in evidence pending a ruling on their admissibility. You may continue, however, Mr. Falls.

By Mr. Falls:

Q Go ahead, Mr. Havemeyer.

A Well, as a result of this information in a similar type of calculation on delivery time as done in Exhibits 142-152 to determine the delivery time per point as indicated in the upper right-hand box, and that will be expressed in terms of minutes per point. Now it is necessary to determine the cost per minute of operating the route system. From four different Borden ledger accounts, 723-071, 068, 023, and 725-023 we have route expenses for O'Hare for March of 1966. And making use of statistical data in A-and-PX 76 we are able to determine the number of wholesale route days in that same period of time, March, '66, to get the cost for wholesale route days. We are able to determine the number of serving minutes in a route day at O'Hare in March, '66, using data from A-and-P Exhibit 74 and 73.

So now that we know the cost per route day and the number of serving minutes in a route day, we are able to determine the cost per serving minutes as indicated on the lower right-hand corner. So now that we have the time per point and the cost per minute of serving, we were able to determine the delivery cost per point as this same approach and set of calculations has been used both for the allegedly discriminated customers as well as for A-and-P.

Q Again, those delivery costs per point are reflected in A-and-P Exhibit 159?

A That is right.

Q Maybe we should bring out this point that with respect to each of the allegedly injured customers there was prepared a sheet of the kind which we have marked as A-and-P Exhibit 159, is that right?

A That is right.

Q So that same process was repeated for various customers involved?

A Yes.

Q Now I think in your testimony you indicated, Mr. Havemeyer, that one reason for the difference in delivery cost per point between A-and-P and Mayfair was the difference in type of service.

A That is right.

Q Was there also part of the difference attributable to a difference in points per case as we found it on truck load?

A Yes. Ther is really three things which determine the difference: type of service rendered, the volume delivered, and the points per case, inasmuch as the latter determines the number of cases which are delivered.

Q And also would percentage taken in glass have some affect?

A Right, and also the percentage taken in glass.

MR. FALLS: All right. Let's see now. I guess we have to mark an additional exhibit now.

JUDGE HINKES: Let me ask you, Mr. Havemeyer, this particular element, physical delivery, constitutes roughly half of the total difference in marketing costs between A-and-P and Mayfair, so that it is very important that we understand the justification for it.

Now, as I asked you earlier with respect to truck loading costs, can you tell me what factor or factors were mainly responsible for that tremendous difference in cost? I understand that all of it contributed to the end result, but, for example, in truck loading costs it was primarily the issue of split cases that accounted for the difference.

THE WITNESS: Yes.

JUDGE HINKES: Now is there such a particularization possible here?

THE WITNESS: Yes, I cannot pinpoint it as much as I could in the case of truck loading, but certainly the paramount point is the difference in the type of service that may be rendered between the two customers. I do not recall offhand the volume delivered to Mayfair as compared to A-and-P, but if there were a substantial volume difference that would be also a significant contributor to that difference. As you have rightly understood, it is a combination of four factors which contribute to this, the four I just named a few minutes ago. And the relative significance of the four would depend upon the specifics of that situation, but certainly difference in type of service would be an important factor.

JUDGE HINKES: Now when you speak of a difference in type of service, what are you referring to really?

THE WITNESS: Well, the principle difference would be if we speak of limited services which -- and the time value for those two different kinds of services we have previously seen.

JUDGE HINKES: Thank you.

By Mr. Falls:

Q Just to pursue that by way of example, for example, it may be asking you to remember the precise details of this customer, it may be that this customer had his product packaged in the display case, or it may be with this customer the driver had to wait and make a cash collection which it did not have to do for A-and-P, this kind of thing.

A That is right. You see it is not just this. For example, suppose Mayfair said, I will pay cash for today. You may recall there was a time value for that of a minute and a third, as I recall. Just suppose Mayfair took all of its volume in glass or, conversely, none of it in glass. The answer to that point would have varying degrees of effect on the difference between the two of them. We do know in the case of A-and-P private label there is no glass, so type of service always stands out, but its relative significance depends upon these other factors of points per case, volume in glass, and volume itself.

MR. FALLS: Now I would like to mark as A-and-P Exhibit 162 a sheet entitled, "Calculation of delivery costs, Mayfair Foods".

(The document referred to was marked Respondent A-and-P's Exhibit 162 for identification)

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By Mr. Falls:

Q Referring to A-and-P Exhibit 162, was this a document prepared by you or under your supervision?

A Yes, it was.

Q And would you explain what it shows, and here again we have one of the large blowups.

A Included in the set of documentation that will be eventually offered and has been submitted to the Complaint Counsel is, I think it is a two-page description of a number of steps involved in the computer calculations of the various costs, and certain of those steps called "element number" on here pertains to the calculation of delivery costs, and if that text description was in front of us we would see, and I think Complaint Counsel has seen that, it will correspond to these brief element descriptions as indicated on this chart. More specifically in the case of Mayfair Foods, and this is a specific calculation for Mayfair ---

Q Let me interrupt you just a second.

Let me mark as another exhibit the list of elements that was supplied Government Counsel. We will mark it A-and-P Exhibit 163, a two-page document titled, "Explanation of Comparative Cost and Discount Calculation"

(The document referred to was marked Respondent A-and-P's Exhibit 163 for identification)

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THE WITNESS: This two-page explanation covers the various steps involved in the many calculations that we will see in the entire document for the calculation of O'Hare customers and certain of those steps, more specifically 1 through 14, and also 20 and 21, pertain to delivery cost. And the chart we have in front of us, A-and-P Exhibit 162, illustrates this specifically for Mayfair Foods, and before proceeding let me point out that the final figure opposite element 21 on this Exhibit .03892 when rounded to four figures is the same one, the same figure which appears for Mayfair Foods on the physical delivery line of A-and-P Exhibit 159. In other words, these two tie in.

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Well, from CX 183 we have the number of dollars purchased by Mayfair Foods. From an analysis of route books for Mayfair Foods we know that the price per point of the mix which they took was .2583. So to determine the points purchased we would divide the dollars purchased by the price per point which is 11,809.

Now the route book for Mayfair's deliveries for March of 1966 indicates 27 stops that month. So the points per delivery, Element No. 5, would be the number of points purchased, Element 3, divided by the number of stops, Element 4. That is about 437 points.

The points per case for Mayfair Foods has also been determined from an analysis of the route book pages for Mayfair, which is 21.93. So since we know the number of points of 437, and we know the number of points per case, 21.93, we determine in Element 7 the number of cases delivered of almost 20 cases, and that is cases per delivery. An analysis of the route book pages for Mayfair Foods indicates that 38.7 percent of the merchandise they took was in glass.

Now we will start putting together the delivery items appropriate to this customer. Based upon the kinds of service they took the variable time per case is 1.947 minutes. Looking at the route book for Mayfair you find that there were four collections per month. Based upon that we have a fixed time per stop of nine minutes. The variable minutes per stop then is the number of cases per delivery as shown in Item 7, multiplied by the minutes per case shown in Item 9, and in addition there is some additional time for handling cases of merchandise in glass which is the number of cases roughly 20 by the proportion in glass, roughly 39 percent times one-tenth of a minute additional time for handling the case of merchandise in glass, and that one-tenth of a minute was also on the delivery time standards that we have looked at before.

So the total variable time per stop for Mayfair would be 39.6038 minutes. Now the total minutes per stop would be the time I just derived in Element 12 plus the fixed minutes in Element 9, plus some time for collection. Well there were four collections in the month. That takes 1.32 minutes per collection, and since there were 27 deliveries, the time per delivery would be the ratio of four times 1.32 divided by 27, so when I add the variable time in 12, fixed time and the added time for collection, I have a total minutes per stop of almost 49 minutes. If I divide that total time by the number of points per delivery shown in Element 5, I have a time per point of .1116, and this would correspond to a box shown in A-and-PX 162, the flow chart, of physical distribution costs, the box in the upper right-hand portion that says delivery time per point. We determine the cost per serving minute at O'Hare in March '76 of .3489, so the cost per point then would be

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minutes per point times the cost per minute equals .0389 rounded off to four places.

If we went through the same kind of arithmetic for A-and-P we would have a cost under the private label program of $.010312. And those would be the figures which appear on A-and-P Exhibit 159 opposite physical delivery.

The same kind of calculation has been developed for each of the other allegedly discriminated customers.

You can see, Your Honor, that on the total minutes per stop, which is roughly 49 minutes, that almost 40 minutes of that is the variable time look at Element 12. So roughly 40 of the 49 minutes is variable time related to the handling of merchandise. Nine minutes is fixed and a little remaining portion is related to the collection time.

By Mr. Falls:

Q This then was carried forward to A-and-P Exhibit 159, is that right?

A Yes.

Q I note that the figure on A-and-P Exhibit 162 does not exactly correspond because the corresponding figure on 159 has been carried out to six places; the figure on 162 was carried out only to four places.

A That is right.

MR. FALLS: All right. Let me next have marked as A-and-P Exhibit 164 a chart entitled, "Branch Clerical

Costs."

(The document referred to was marked Respondent A-and-P's Exhibit 164 for identification) xxx

By Mr. Falls:

Q Mr. Havemeyer, was A-and-P Exhibit 164 prepared by you or under your supervision?

A Yes, it was.

Q Would you explain what it shows?

A This shows the development of the branch clerical costs for the customers, and I think as indicated by the terms here it again follows the principles used in A-and-P 142 through 15[illegible], that is, from accounting records we determined the branch clerical expense at O'Hare in March, 1966, a proportion of which is applicable to the regular wholesale business. You may recall that there is also bulk business at O'Hare and school business. So we determined that portion which is applicable to the regular wholesale business and that is what is expressed in the upper right-hand box.

Using A-and-PX 74 we determined the number of delivery tickets for O'Hare wholesale in March, 1966, and get the branch clerical expense per delivery ticket. That is, expense divided by number of delivery tickets is a clerical cost per ticket, and a ticket is a summary or write-up, if you will, of everything delivered to that customer, and so cost per ticket divided by the number of points delivered to that customer, and we determined this from analysis of route book entries, then gave us branch clerical point per point for this customer. And with the calculations developed in that manner it results in the figures appearing on A-and-PX 159 on the line captioned, "Branch Clerical Cost".

Q Again, if one looks at A-and-P 159 to see a difference between the cost, the branch clerical point per point for A-and-P and the branch clerical cost per point for Mayfair, is that attributable to the fact that the two stores had differences in the point per delivery?

A Yes.

Q And again there is a difference between branch clerical costs of A-and-P considering only private label and considering both private label and Borden label. Is that attributable to the product mix when you take Borden into account?

A That plus the fact that is the amount of work done in writing up the delivery tickets in the case of A-and-P's total purchase.

MR. FALLS: Your Honor, we are going on now to another item. Maybe we could take our afternoon recess.

JUDGE HINKES: Yes, I think this would be an appropriate time. We will take a short recess.

(Short recess taken)

JUDGE HINKES: On the record.

MR. FALLS: I would like to mark as A-and-P Exhibit 165 a chart entitled, "Product Waste Cost".

(The document referred to was marked Respondent

xxxxx A-and-P's Exhibit 165 for identification)

By Mr. Falls:

Q Mr. Havemeyer, was that document prepared by you or under your supervision?

A Yes, it was.

Q Would you explain it?

A Inasmuch as the product waste cost was not applicable to the private label program by virtue of the conditions of the private label program, we determined this cost separately and applied it to the points or the volume eligible for this product return privilege. So we have a product waste cost in account 723-023 subaccount 17, for O'Hare for March, 1966. We want to divide that by the number of points eligible for the return privilege. In order to get the latter figure we first had to determine from A-and-PX 76 total points sold through O'Hare March, '66, and subtracted from that the number of points sold to stores receiving limited services. The remaining volume then would be those stores where the volume is the same which was eligible for the return privilege, and when we divide the cost of product waste by this volume in points we had the product cost per point for stores which were eligible for the return

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service. And the figure resulting from that appears on A-and-PX 159 opposite the line or the caption, "Product Waste". And you will see that there is no cost for that function in the case of A-and-P.

MR. FALLS: All right. Now I would like to have marked as A-and-P Exhibit 166 a chart titled, "Branch Selling Costs".

(The document referred to was marked Respondent A-and-P's Exhibit 166 for identification)

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By Mr. Falls:

Q Mr. Havemeyer, was 166 prepared by you or under your supervision?

A Yes, it was.

Q Would you explain it to us?

A From account 723-23, subaccount 4, 36, and 50, gave us various costs associated with the branch selling expense at O'Hare in March, 1966. Inasmuch as some of that represented people, we added to it a fringe benefit percentage which we had determined previously for other purposes. This then gave us the cost of branch selling expense. Such a function was not applicable to the private label program and we, therefore, divided that by the number of points delivered to independent stores which figure was determined from an analysis of route books to get the branch selling cost per point for the independent stores. And that figure appears on

A-and-PX 159 for Mayfair Foods opposite the caption "Branch Selling Expense".

MR. FALLS: All right. I would now like to mark as A-and-P Exhibit 167 a chart titled, "Borden Brand Advertising Expense".

(The document referred to was marked Respondent A-and-P's Exhibit 167 for identification)

By Mr. Falls:

Q Mr. Havemeyer, was A-and-P Exhibit 167 prepared by you or under your supervision?

A Yes, it was.

Q And would you explain it, please?

A This one appears complex because of the fact that the Borden accounting system, as frankly, most dairy accounting systems, do not provide in their routine the kind of detail which is needed or the kinds of refinement needed for a study of this type.

We had from the Borden accounting records a figure shown in the lower left hand box, the average year-round advertising per wholesale point for the Chicago Metropolitan Area, and the primary problem here was a problem to associate with that cost the costs that associated with it. So the upper portion of this flow chart has as its purpose to determine the figure in the box entitled, "Total Points Affected By Borden Advertising".

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Now let's go to the top line, please. From various A-and-P exhibits and route books as shown above the top line of boxes we determined that segment of the business to which advertising would not apply, such as non-store points on regular wholesale, bulk wholesale points, platform and counter sales, and private label points. Their sum gave us the number of points that were not affected by or applicable to Borden's advertising expense.

So when we subtracted that volume from the total wholesale points in the Chicago Metropolitan Area it gave us total points which were affected by and applicable to Borden advertising.

As I mentioned at the outset, we had from the accounting record an average year-round advertising cost per wholesale point which we expressed as cents or dollars per point. Multiplying that by the number of total wholesale points in the Chicago Metropolitan Area gave us the estimated advertising expenditure, per their records, for the Chicago Metropolitan Area. Hence, we had the advertising expenditure on the year-round basis, we had the number of points related to it. That is the number of points which were affected by Borden advertising. And when we divided the dollar expenditure by the points we then had the advertising cost per Borden label point, and that is the cost that appears on A-and-P Exhibit 159 for Mayfair Foods on the line captioned

Borden Label Advertising Expense", and you will see when you refer to that that in the second set of columns where we are determining the cost of all of the service -- I am sorry. All of the volume delivered to A-and-P including Borden label points, why there is some cost there for that function. But there is no cost for Borden label advertising in this the left-hand set of columns which apply only to the private label program.

MR. FALLS: I would now like to have marked as A-and-P Exhibit 168 a chart titled, "Borden Brand Merchandising Expense".

(The document referred to was marked Respondent A-and-P's Exhibit 168 for identification)

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By Mr. Falls:

Q Mr. Havemeyer, was this document also prepared by you or under your supervision?

A Yes, it was.

Q Would you explain it to us.

A The principal calculation on this flow chart is involved in determining what is expressed in the lower right-hand box, namely, the regular wholesale points requiring merchandising support in the Chicago Metropolitan Area, because once we have determined that, we divide that into the merchandising expense from account 730-032M, for the Chicago Metropolitan Area to get the merchandising expense per point.

We arrived at the figure in the lower right-hand box through a ratio. We started out with the total wholesale points at O'Hare A-and-PX 76. We subtracted from that the number of wholesale points not requiring merchandising support to give us the number of points which did require merchandising support and get a ratio between that latter figure and the volume which we started with, that is, the wholesale points at O'Hare in March of '66.

Now remember that I must always match up the volume with the volume to which the money will be allocated by the expenditure that is, they must relate to the same area, in this case Chicago Met, because that is where I have my merchandising expense dollars, so I can find it on the Borden accounting system.

So now I go back to the middle line and I get the wholesale points at Chicago Met, at least that corresponds then in total to the merchandising expense for Chicago Met. I subtract the bulk wholesale points which don't receive such a function or support, and I get a total regular wholesale point for Chicago Met, and as indicated from the -- I bring down the ratio which I had determined at O'Hare to determine the proportion -- I have to apologize. On the flow chart itself a line has not been drawn in, although it does appear on the sheet in front of you. There should be a line going from that box to the ratio box with a multiplication sign.

I assume it is on everybody's copy.

So we have brought this ratio down to multiply it by the wholesale points for Chicago Met Area to determine the number of wholesale points in the Chicago Met Area that would require merchandising support, and so that volume is divided into the money spent to get the merchandising expense per point.

This was a situation where all of the records which would have made this simpler were not available and, therefore, we arrived at this figure in the lower right-hand box through the ratio at O'Hare, but also from a record of wholesale points in the Chicago Met Area which we secured from A-and-PX 75. And the result of that calculation appears on A-and-PX 159 in Mayfair Foods opposite the caption, "Borden Label Merchandising Expense".

MR. FALLS: I would now like to mark as A-and-P Exhibit 169 a chart entitled, "Overhead Costs".

(The document referred to was marked Respondent A-and-P's Exhibit 169 for identification)

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By Mr. Falls:

Q Mr. Havemeyer, was Exhibit 169 prepared by you or under your supervision?

A Yes, it was.

Q And would you explain it to us.

A In this exhibit we go back to data developed under each

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of the other elements or components of marketing expense. That is, we go back to truck loading and physical distribution, branch clerical, product waste, branch selling, Borden brand advertising, and Borden brand merchandising. And again it is a problem of matching up content of expenditures of the overhead expenses with the content of each of these components of marketing expense which will correspond to the overhead expenses.

In other words, we want to determine the overhead expenses and all the other components of marketing expenses which pertain to store customers at O'Hare. That is the purpose of this.

Now, we go back to truck loading, physical distribution, branch clerical, and product waste, and we determine the portion which is not applicable to store customers. And as we get into the details later we will see how that is done. It is done in a different manner I believe for each of those four segments and as a result by subtracting out that amount we get the proportion of truck loading distribution which is applicable to store customers.

We do not have to go through that much calculation to determine the branch selling expense applicable to store customers or the Borden brand advertising, or the Borden brand merchandising applicable to store customers, in which case they are brought over in a more direct manner. In any [[redacted]]

By Mr. Falls:

Q You now, I think, Mr. Havemeyer, have gone through all of the elements of expense or of cost which are reflected in A-and-P Exhibit 159, is that right?

A Yes, 159, yes.

MR. FALLS: Now I would like to mark as A-and-P Exhibit 170 a folder bound together and titled, "Mayfair Food".

(The document referred to was marked Respondent A-and-P's Exhibit 170 for identification)

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By Mr. Falls:

Q Mr. Havemeyer, let me direct your attention to A-and-P Exhibit 170.

We have given you one of these, I believe.

MR. MATHIAS: No, you have not. You gave us an uncorrected one. We have no bound copies.

(Document handed to Mr. Mathias)

By Mr. Falls:

Q Let me direct your attention to A-and-P Exhibit 170, Mr. Havemeyer, and ask you whether you can identify that for us.

A Yes. This is a cost and discount study which incorporates the various procedures I described in the several flow charts leading up through A-and-PX 169 as applied specifically to an allegedly discriminated customer, Mayfair Food.

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Q Now, Mr. Havemeyer, did you conduct your study in the same manner for all of the allegedly injured customers on the O'Hare route identified in CX 183 as you did for Mayfair Foods?

A Yes.

Q You used that same general technique?

A Yes.

Q Did you select out of that -- what is it? 28 customers?

A Yes.

Q -- Eight of the 28 for more detailed treatment than the other 20?

A That is right.

Q Would you explain what the difference in the procedure and technique was between the eight for which you made the very detailed study, and the other 20?

A Yes. The analysis of the route books was an extremely detailed and lengthy job, and as I menttioned in my description of A-and-P Exhibits 142 through 152 regarding the pre-bid profit and loss analysis of the private label bid, we had selected three routes at the O'Hare branch and one of the purposes of that three route selection was to include eight of the large allegedly discriminated customers from the group of 28, and for each of those eight we determined specifically the details of their deliveries from entries in the route book pages for those specific customers.

For that purpose among other things we needed the sales value per point for each of those eight customers and the points per case and the percent of glass or merchandized in glass for the remaining customers on those three routes. And those remaining customers were not those allegedly discriminated against.

We did the same kind of detailed development on points per case, dollars per point sales, dollars per point and percent of merchandise in glass. Having determined that for all of the customers on those three routes we then developed the average of each of those three figures, dollars per point, points per case, and percent merchandized in glass, and applied that to the remaining 20 customers of the allegedly discriminated customers.

So for the remaining 20, which were the smaller customers among the group of allegedly discriminated customers, we used their actual sales dollars as reported on I think CX 183, but we used this average of value of dollars per point, points per case, and percent merchandized in glass, to develop those costs, but the costs for those remaining 20 are based upon the conditions, the delivery conditions as indicated by testimony and stipulation, and is based upon the dollars of purchase which they took and so with the exception of using the average figure for each of these three items I just mentioned, we determined the cost of those other 20 in

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exactly the same way.

Q The only three points on which you used averages for these other 20 customers were points per case, dollars per points, and percent glass?

A Yes.

Q Everything else was determined on a customer by customer basis?

A Yes.

MR. FALLS: Your Honor, the only thing I have left on direct examination with respect to this series of exhibits is that we want to mark as exhibits similar books for the other customers. We aren't able to do that right this minute because we are replacing some pages, one page in each book. We will have that tomorrow morning. All I plan to do is ask Mr. Havemeyer to identify them as being what they are, and I have no other questions with them to put to him.

So, I would suggest either we adjourn now, or if Mr. Mathias wants to commence his voir dire, he can.

MR. MATHIAS: Well, Your Honor, it is going to be rather difficult to make much headway this afternoon with voir dire, in that there are a number of other similar documents to be identified which we don't have in our hands yet. We might want to make similar points with several of the documents, and rather than going through them one by one, this won't be quite the same as it was with 142 through cost of 1310 per case.

So we have at O'Hare in March, 1966, account 723-037, a copy of which is the second page following the page you are looking at ---

Q And that is a portion of Respondent A-and-P Exhibit 72, is it, sir?

A I think it is. I don't have my A-and-P exhibit list here. The ledger accounts.

Q Could you hold up just one moment, sir, while I attempt to get that ledger account, because the one in my booklet is almost impossible to read.

All right, sir. I have now location 723, account 037, which is dated March 31, 1966, and entitled, "Final Expense Summary". Is that the ledger sheet to which you are referring, sir?

A Yes, and there is a circled figure, at least on the one I put in your document book, of 26,756.29.

Q I see, sir, according to A-and-P Exhibit 67, which is the chart of accounts that that is the only loading expense at the O'Hare branch, is that correct, sir?

A Yes.

Q Then what have you done with it, sir?

A All right. In the section below that figure we are now subdividing that $26,800 figure among the three types of business which are loaded on the trucks and there is regular wholesale business, there is vendor business, and there is bulk wholesale.

Q Where do we find those figures, sir?

A All right. Now, what we are going to determine is the number of points for each of those three categories of business. Would you now turn three pages.

Q Yes, sir.

A To Item 14 indicated on the upper left-hand corner, which is also A-and-P Exhibit 76. It is entitled, "The Borden Company Central Divison, Points Sold By Branches and Regions, Strictly Wholesale Points For The Third Month Ending 3-31-66". And I have circled figures under the column headed, "Strictly Wholesale Points". It shows that O'Hare wholesale is 1,820,720 points, and that O'Hare bulk is 1,329,935, and you will find those two figures transferred to the second sheet in this attachment which has at its top the $26,000 amount.

Q I see another figure there, "Vendor". That does not appear on that same sheet does it?

A No. In the attachment on branch clerical expense and in this attachment we have to go through a somewhat detailed analysis because of some missing data in the Borden accounting system to determine the point value for the vendor business. Would you turn four pages, please? This same sheet will also appear in branch clerical, but I also have it in this section.

Now inasmuch as the vendor volume for O'Hare in March of 1966 was not available to us in an accounting record we had to do some proportioning, so I will have to go from an explanation of this page, which is probably the most difficult page in this attachment. First I will explain the relationship of several figures here. I assume we are all on a page entitled, "Analysis of O'Hare Branch Clerical Expense"?

Q That is the fourth page back. Actually it is the fifth page in Attachment 2, is that right?

A I think it is. Analysis of O'Hare Branch Clerical Expense Item 10, Location 723 Account 004.

Now let us stay with the vendor column. We are getting relationships here. On the second line is a figure of 2,139,075, and that divided by the next figure, 3,050,041 results in the third figure of 142.59 percent. Now the first figure in that column ---

Q I think to correct you in order to keep the record clear, you said you divided the 2 million by the 3 million. You actually divided the 3 million by the 2 million.

A Oh, yes, of course.

Now the first figure in the column, 753,166, bears the same percentage relationship to a figure which we did not get from an accounting record but which we will calculate and which will go opposite the line item 14 March, 1966, which is then 1,073,930.

Q Sir, first of all, where did you obtain the figures on the second and third line, the 2,139,000 and the 3,050,000.

A Well, the line captions indicate that. Item 13, which provides the 2,139,000 is A-and-PX 75, and that should be behind us. Let's see if it is.

Q I don't seem to find it, sir. Not immediately behind it anyway.

I find that on the first page of Exhibit 75 and behind on line 68 whereas you have line 80 here.

A No, I don't think we are talking about the same line. Oh, I am sorry. I think you are right.

Q So this should be line 68. Over in the left that should be line 68.

A I think so, and I would like to see the original since I never had that to read from.

Q You might check while you have it up here. I think that the line 13 reference is wrong too; that that should be 70.

A That is right. That should read line 68 and line 70.

Q Would that be true for the next Item 13 for March '66 as well where you obtained the 3,050,000 figure?

A I think so. If you can show me where to find the March statement.

Q It should be a part of that.

A Oh, here it is. That is right. Okay.

So those two figures under the vendor column came from A-and-PX 75 for the fifth period of '65, line 68, and for March, 1966, line 68.

Q Now in each case, sir, these figures are for the Chicago Met Area, is that correct, sir?

A Yes.

Q Rather than for the O'Hare branch?

A Right.

Q Now, you have obtained a ratio between those two figures and applied them to a figure in the first line 753,156, is that correct, sir?

A Yes.

Q And where was that figure obtained, sir?

A A-and-PX 70, fifth period 65.

Q And was that for the O'Hare branch, sir?

A Yes.

Q So you are assuming are you not, sir, that the O'Hare branch had the same ratio of vendor sales as did the entire Chicago Met Area in making this calculation?

A Yes, that assumption is implicit there, and I think it is a reasonable assumption in view of the fact that O'Hare was such a significant portion of the Chicago Met Area.

JUDGE HINCKS: How significant?

THE WITNESS: You may recall this question came up the other day, when we showed that O'Hare was the looking at something else at the moment, but I don't think ---

Q Would you like me to re-put the question?

A Would you, please.

Q What I am saying, sir, is that in applying the ratio, this 142.59 percent, which you got by dividing the 2 million figure into the 3 million figure, in applying that to the May, 1965 vendor sales out of the O'Hare branch, you have assumed that the experience of the entire Chicago Metropolitan Region in so far as increases in vendor sales is concerned during the interim period between May '65 and March '66 was typical of the O'Hare branch as well, is that correct, sir?

A Yes. Remember also that we don't have that figure from any Borden record.

JUDGE HINKES: I don't like to interrupt, but I do have a phone call that must be taken. I think this is as good a point as any to break off, and perhaps if overnight consideration, we will be able to progress further with this particular matter.

MR. MATHIAS: All right, sir. Fine.

JUDGE HINKES: Let's recess then at this point, and we will resume at 10:00 tomorrow morning.

(Whereupon, at 4:05 p.m., the hearing was recessed, to reconvene the next day at 10 a.m., Tuesday, May 7, 1974) that is entitled "Analysis of O'Hare Branch Clerical Expense."

MR. WALTERS: Yes, sir, and that was a part of Attachment 2 involved in the calculation of loading expense.

JUDGE HINKES: Now, before we start, let me try to bring myself up to date to be sure that I can follow the argument, such as it may be. Let me ask you, Mr. Havemeyer: The figures in the "Vendor" column on that page with respect to the fifth period, '65, and March, 1966, are roughly 2 million and 3 million, respectively. Does that represent expense or points or what?

THE WITNESS: That is the point volume for the so-called vendor category for the Chicago metropolitan area for these two different periods.

JUDGE HINKES: Now, then, the first line, which is apparently captioned "O'Hare, fifth period, 1965" in that same column, has some 700,000. That again is points?

THE WITNESS: Yes.

JUDGE HINKES: Now, if I understand this chart, you aim to adjust that 700,000 figure by the same amount, percentagewise, that the Chicago area figures experienced between May 1965 and March 1966?

THE WITNESS: Yes, sir.

JUDGE HINKES: And you do that on the assumption that the O'Hare route -- or perhaps it is more than an assumption, but you can straighten me out whichever way it is -- that the

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O'Hare route would have experienced the same degree of change as the entire Chicago area did?

THE WITNESS: For the vendor category.

JUDGE HINKES: For the vendor category?

THE WITNESS: Yes.

JUDGE HINKES: Now, is that line of reasoning equally applicable to the counter sales? That is the last column on that same page.

THE WITNESS: Probably not, and, as you notice, or as you will see as we proceed through this, we did not attempt to put a figure in that blank spot.

JUDGE HINKES: But you do have a percentage figure, and I don't know why that is put in there.

THE WITNESS: I think that will become obvious as we continue to go through this page.

JUDGE HINKES: Very well, then; I will bide my time.

THE WITNESS: Under the vendor category, we are saying O'Hare was a substantial branch, and O'Hare included vendor sales of 753,000 points; the Chicago metropolitan area experienced a substantial increase in vendor sales; it is likely, therefore, that O'Hare experienced a substantial increase in vendor sales.

JUDGE HINKES: Now, according to this, it would appear that the O'Hare route may have accounted for 30 percent of the Chicago area?

surrounding and including this March 31, 1966 or contemporaneously therewith, to determine whether or not, in this particular Account 723-037, such a credit was typical of that account?

A I can't answer your question because I did not participate in all the details.

Q But you do not know of any particular study of that type?

A At this moment I don't.

Q All right, sir. I note that, in the chart of accounts which is A and P Exhibit 67, in the subaccounts under Location 723-037, there is an Account Number 20, "Loading Expense Depreciation." Now looking at the specific expense ledger sheet which you have used for March 31, 1966, that subaccount number does not appear in the detail or among the various expenses listed thereon.

Was any study made over a period of time of this particular account number to determine whether or not this particular expense was typically charged to this account?

A I would have to give you the same response as I did to the previous question.

Q You do not know?

A I don't know at this time because I did not participate.

Q Was any such study made to determine whether that particular account depreciation might have been posted to this specific location and account number on a quarterly or other basis other than a month?

A Same response.

Q So at this time you do not know?

A No.

Q And that would hold true of any other subaccount numbers that might appear in the chart of accounts but do not appear in this specific ledger sheet, is that correct, sir? Your answer would be the same?

A Well, yes -- now, since you are asking a more generalized question, I want to give you a more generalized response. A Chart of accounts -- or I should say, the inclusion of an account or subaccount in the chart of accounts does not necessarily mean that you should expect expenses there when you establish what we will call a master chart of accounts. It means that there can be expenses accepted in that account or subaccount, but it does not necessarily mean that there must be expenses in that account or subaccount.

Q But you are not aware at this time of any study being made to determine whether or not any of these other subaccounts typically appeared at this location under this account number?

A That is right, not at this time.

Q Now, sir, going down to your distribution of the expense which you selected from this ledger card, you have allocated this expense equally on the number of points served on three types of distribution out of that O'Hare branch, is that half-million points per month.

A Yes.

Q Now, there is an equivalent number of routes in regular wholesale and bulk wholesale carrying well in excess of 3 million points per month. Now, my question is this: If the retail routes must be considered in this loading expense, wouldn't there be a difference in the loading expense for each of these trucks due to the fact that you are loading a so much smaller volume onto approximately the same number of trucks, taking into account the idea that there does have to be some expense in moving these trucks in and out from the loading platform?

A Hypothetically, yes, but at least two reasons might argue against that. One is that it is only a small portion or a small -- small portion of loading crew or small number of men involved in jockeying, as they call it, of the trucks as compared to the total number of men involved in loading.

And, secondly, I don't recall any evidence which says that there was much jockeying or any jockeying at all. For example, they might have had the type of out-loading operation such as Bowman Dairy had at its River Forest plant, where there was a long -- I guess you would call it island-type platform, where trucks could be backed in at the end of the route-day and stay there and not have to be jockeyed.

Q Do you think, sir, that there was an island long enough to back up 66 trucks?

they start to get as complicated as this, we are not going to make any headway in these hearings.

MR. FALLS: Let me say, Your Honor, the reason why no advance notice was given was because this resulted from some rechecks that Mr. Havemeyer did last night. He was up all night.

The reason it isn't typed is because it was just prepared and xeroxed actually during the course of this morning's hearing. I would be happy to provide in whatever way you think best.

If Mr. Mathias thinks it would be helpful to take some time to have Mr. Havemeyer explain off the record what these changes are, perhaps that would be advisable.

JUDGE HINKES: Would it be preferable, Mr. Mathias, to go on to some other subject and in the meantime, be supplied with whatever work papers you think necessary so that you can examine the figures, or would you rather have some off-the-record explanation by Mr. Havemeyer so that you can get this explanation immediately?

MR. MATHIAS: One of the problems, sir, is how pervasive are these changes? This worksheet appears in quite a few sections of this particular exhibit, and I take it, the other similar exhibits.

I am referring now to Exhibit 170. The question is, are we going to run into this just about every figure and every calculation we come to, or is it something that can be explained once and taken care of?

I just don't know the seriousness or the gravity of the changes that have been made here. The various points below this line, it appears a great number of the figures, a very great proportion of the figures, have been changed herein.

The number of customers receiving certain services, for instance, has been changed. The number of customers having certain collection experiences has changed substantially. Down below under the various categories, cases delivered, the variable minutes of service time, ---

JUDGE HINKES: Don't you think it might be helpful, then, under those circumstances to have Mr. Havemeyer explain to you and to your Staff, off-the-record naturally, just what these changes are and how they were arrived at rather than simply obtaining from him work papers which you will then have to study and, then, perhaps still have to ask him to explain?

MR. MATHIAS: Sir, I think it would be helpful to have both. I believe we should have the work papers as well so that we can double-check the work that he has done, plus I believe that an explanation would be quite helpful too.

I think both would be very helpful to have an explanation and say, for instance, a dollar amount figure that has been changed from $14,722 to $7,977, it may be that the explanation is, we reviewed our underlying worksheets and we added it up and it came to 7,977.

Your Honor, if that is the case, we should be able to check over those worksheets ourselves and see that the figure has been corrected properly this time. It is just as possible that an error was committed in this late, hurried correction as it was in the original review of this material which supposedly had a great deal more time devoted to it, so that I believe that we should have both, both the explanation and any work papers that are associated with it.

JUDGE HINKES: Where are the work papers, Mr. Havemeyer?

THE WITNESS: I have work papers here, in anticipation of this, written out so that Mr. Mathias and his staff will be able to check it. Let me say that the principal reason for change in this is because of the one figure which has been already referred to, 1,696,732 points in column 17, and by coincidence, a figure which Mr. Mathias mentioned leads me to believe he does understand the concept of this table, the 7,977.24 under column 7.

There has always been a problem in reading the route books because of the kinds of entries made by routemen. Now, because of the chain-like linkage, if you will, of all the numbers in the entire calculation, changes there, literally gone through all of this or create changes through all of this, but there are the principal changes -- there are minor changes in

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now, Mr. Mathias.

VOIR DIRE (resumed)

By Mr. Mathias:

Q Mr. Havemeyer, in connection with Respondent A & P Exhibit 170 and the section involved in the analysis of truck loading expenes, at the close of voir dire yesterday we were discussing a work sheed in Attachment 2 of Exhibit 170 which exhibit had calculation of total cases loaded on regular wholesale routes, O'Hare Branch, March 1966. We were discussing the total points served on those regular wholesale routes in March of 1966.

You referred us at that time to a work paper which was the predecessor of Respondent A & P Exhibit 180 and indicated that that figure was taken from the last line of that work paper, which on Exhibit 180 shows the figure 1,696,732 points; is that correct, sir?

A Yes.

Q Turning to that work sheet which is now Respondent A & P Exhibit 180, how was this figure, 1,696,732 obtained, sir?

A It is the aggregate of point volumes that appear on summary tabulations in the front of each of the O'Hare route books for March 1966.

Q Would you get us one of those route books, sir, and indicate to us which tabulation you are referring to?

MR. MATHIAS: Are the route books here?

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MR. FALES: I am afraid they aren't.

JUDGE HINKES: Off the record.

(Discussion off the record.)

JUDGE HINKES: On the record.

By Mr. Mathias:

Q Sir, there was a substantial change in this number. At least, there was a change in this number from your original work sheet which originally bore the figure 1,729,262. What caused that change, sir?

A Well, the figure which now appears on A & P Exhibit 180 is an actual aggregate of figures which I just referred to in the front of each of the route books. Previously, the 1,729,00 which is about a difference of about 25,000 from what appears now have been also based on those data, but have been modified somewhat by us in going through those summary tabs at the front of each route book.

When we get the route books, you will notice -- and I think we went over one of them yesterday in one of the informal sessions -- each of these tab summaries includes, I would judge perhaps six to nine figures. Some of them are called package points.

Originally, it appeared to us that those points might not be in conformance with the usual point values for these relatively minor items. But the reason for the change then is that upon reflection, it seemed to us that we had no documentary evidence to support this and therefore went back to the original data which now appears in those route books.

Q So, you did use these route packages?

A Yes.

Q How would that account for a lessening, rather than an increase in the figure?

A Oh, the bulk packages are included in both figures. In our original work, we thought that some of those bulk packages would have a value of more than one, point value of more than one. So, we had assigned a point value of more than one. When we went through the arithmetic, it came up to 35,000 more points.

Q Was there a work sheet or any document from which these calculations were made assigning an additional point value?

A No.

Q Do you know whether or not a work paper was prepared at the time showing what point value was assigned to these bulk packages?

A No. I know that there was none because in each case, we had to use judgment as we went on each route book.

Q Sir, this sheet in the front of the route book, is this part of the route book, or is this an insert in each of these route books?

A It is an insert. Although it is stapled in, I don't know if you call that a part of the book, whether it is a separate

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document.

Q Was any check made to determine whether the number of points shown on this alleged summary sheet conformed with the number of points shown as being delivered within any of these books?

A Yes, some check was made. As I recall, they will come out close, but not exactly the same. As you look at thessheet, you will see that it is part of what is called route reconciliation activity, which is a monthly ballancing, if you will, of moneys collected, moneys owed. It is all part of both the audit system of route accounting as well as -- what do I call it -- a tie-in with the man's pay.

Q What testimony or evidence in the record indicates that this particular summary sheet or particular sheet that you have used is a summary of all of the points delivered on the particular route during that particular month?

A I don't know what in the record says that.

Q You know of nothing in the record that says that? Mr. Pergler did not testify concerning this reconciliation, did he, sir?

A I can't recall.

Q At this time, you have no recollection of any such testimony?

A That is right.

Q Can you recall anyone else having testified or any other exhibits that would indicate the meaning and purpose of this particular sheet?

A I can't recall specifically now, Mr. Mathias, having read so much. I just don't know at this time.

Q You have no recollection of any such testimony or exhibits at this time?

A No. My problem is always knowing what I read and whether that became part of the record or did not.

Q But you have no recollection at this time of anything in the record that indicates this?

A That is right.

Q Sir, as long as we are on Respondent A & P Exhibit 180, there were a number of other changes that were made in this document other than the change on line 8 of points delivered. Now, could you explain for us, first of all, on this line 8, points delivered, the nature of the changes which you have made in the other entries on this line which go to make up this one or which are a part of the 1,898,000 figure that you have computed on this page?

A Yes, there is one other basic change and then other changes stem from the ones we have just been talking about and the one I am about to describe. There is, in Columns 4, 5, 6 and 7, information on independent stores on these routes that receive limited service. In Columns 8, 9, 10, 11, 12 and 13, information on stores, independent stores, receiving full service.

Originally, in our analysis of the route books, in addition to other information, we had classified customers, independent store customers, by these two categories. The next major change, then, on A & P Exhibit 180 was a reclassification of some of the independent stores from the limited service category to the full service category.

There were 5 of the 20 stores so reclassified. As a result of that, the dollar value delivered on line 6, which originally had been $14,722.21, was reduced to $7,977.24. Those five customers and their associated dollar value were transferred to the full service group. Such that you will notice on A & P Exhibit 180, there is now 15 independent stores serving limited service and 72 service, full service, as compared to the original figure of 20 and 67 respectively.

So, the totals of those two are still 87 stores, but 5 of them were reclassified. Similarly, the original values for dollars delivered on line 6, which originally had been $14,722.21 and $57,565.82, are now changed for those five stores, and the new sum of those two figures is the same as the old sum.

Now, by dividing those dollar values on line 6 for those two groups of stores by the dollar value per point on line 7 immediately below those total dollars, we would get a derived number of points delivered. That brings us to line 8, which is where the 1,696,732 also appears in Column 17.

Q Now, sir, where did these dollar figures from which you derived the point figures come from?

A From the route books.

Q Was this from the individual entries?

A Yes.

Q For what period of time?

A For March 1966.

Q Did you take the dollar value for the entire month?

A Yes.

Q How did you obtain the dollar value derived on line 7?

A Line 7 is dollar value per point.

Q Dolar value per point, excuse me.

A If you will turn to -- excuse me. What is the exhibit number of the A & P documentation package?

Q Exhibit 171.

A Shall I continue on this subject?

Q Yes.

A If you will turn to A & P Exhibit 171 to Attachment 8, and it would be the sixth page in Attachment 8, it is a page that is entitled Analysis of O'Hare Branch Route Books non-A & P Stores.

Q That is not the sixth page of mine.

A We may be referring to this page quite a bit, so I will put my identification on this to find it easily.

Q On my book it is page 15. That is analysis of O'Hare Branch route books, Routes 3W, 11W and 18W.

A Yes.

Q 3W, 13W and 18W, excuse me.

A Yes.

Q Sir, could you tell us how you get the figure on line 7, the dollar value per point?

A Yes. First let me indicate to you that there is a total line on this page, grocery customer total. We will be working with that line. Let me also point out that there are two groupings of the stores above that line. I am now going to regroup them mentally, if you will.

The groupings are this as to type of service. There are three stores in those groups which received limited service. It is store No. 253, Book 13, page 17. I would suggest that you draw a line across them.

The next one, which is Store 335, Book 13, page 18, it is the next-to-the-last store, store No. 151, Book 18, page 17.

JUDGE HINKES: What about those stores?

THE WITNESS: Those stores received limited service, and the other stores on that page received full service.

Now, we are merely going to regroup data in the various columns to the right of that by those two categories. Namely, three receiving limited and the remaining receiving full service. I could read the number into the record, if you like. We went over this informally yesterday.

If you go to the number of points column, store No. 253 has 1202 points, Store 335, 800 points and Store 151, 649 points. Add those up and you have 2651 points, which we asked you to post in pencil on your page yesterday. Subtract that figure from the total, 33,787, and you get 31,136. We now have the number of points regrouped by those receiving limited service and those receiving full service.

JUDGE HINKES: What is the figure again?

THE WITNESS: It is 31,136.

By Mr. Mathias:

Q What was the total of those?

A It was 2651.

Q Twenty-six hundred fifty-one?

A Yes.

Q Are these figures that you are reading off are for the two-week period ended March 19, 1966?

A That is correct.

Q That is not a monthly figure?

A If we do the same grouping number cases total, the two subgroup figures now are for the limited service group, 125.45, and for the full service group, 1,361.70. You do the same thing for the next column entitled Number Cases Glass. The figures respectively are 47.00 and 345.75. You do the same thing.

JUDGE HINKES: What was that last figure?

THE WITNESS: 345.95. You do the same thing in the next column entitled Total Dollars for Two Weeks. The figure for three stores is $794.83, for the full service stores, $8,574.83.

We go to the next column entitled Month Total Dollars. The two groupings are for limited service, 1,406.82. For full service, 21,986.75. The next column, Cases ---

JUDGE HINKES: One moment here.

THE WITNESS: Yes, sir.

JUDGE HINKES: All right.

THE WITNESS: The next column is Cases per Delivery. This is a calculation for the limited service group is the number of cases shown as 125.45, divided by the number of deliveries. You will note the number of deliveries is also posted in the left-hand column.

For those three stores, the number of deliveries was 36, three of them each receiving 12 deliveries. 125.45 divided by 36 equals 3.48 cases ~~of~~ per delivery for the limited service group. If we do the same arithmetic for the full service group, the answer is 6.36.

The next column is Percent Glass Cases. Again, it is a calculated figure. Drawing on the subtotals in the columns entitled Number Cases Glass and Number Cases total for the limited service group, the answer would be determined by dividing 47 by 125.45, which would be 37.47 percent, which you would post under the column entitled Percent Glass Cases.

Doing the same arithmetic for full service group, it is 25.40 percent. We now come to the next column which is what led us to this page, Dollar Value per Point. For the limited service group, it is determined by dividing the number of dollars in the column entitled Total Dollars Per Two Weeks, 794.83, by the number of points, 2,651, which gives us .2998.

If you do the same thing for the full service group, we have as a result .2754. Finally, the column of Points per Case. We divided the number of points by the number of cases which, for the limited service group is 2,651 divided by 125.45 for an answer of 21.132.

Doing the same arithmetic for full service group, we derive an answer of 22.866. Now, figures from these two subtotal groups will be carried to other pages. Specifically, to A & P Exhibit 180.

By Mr. Mathias:

Q Mr. Havemeyer, looking back to the figures you have just read off and the total dollars which you have, is that a computed figure or is that a figure taken from the route books?

A That should be a figure from the route books.

Q So that if we, according to your analysis of the route books and the totals of each of these customers, the alleged full service customers, took 21,986 dollars and some cents during the full month of March, whereas the limited service customers, took $1406, those figures are taken by you from the route books; is that correct, sir?

A Yes.

Q Now, sir, looking back to the total for two weeks, which you derived most of your calculations, if we look at the limited service customers, the total for the two-week period which you have used $724 which is just slightly better than 50 percent, in the case of the so-called full service customers.

JUDGE HINKES: Would be 50 percent of what?

MR. MATHIAS: Of the total month's dollars in the next column.

JUDGE HINKES: Go ahead.

By Mr. Mathias:

Q And comparing the so-called full service customers' dollar purchases for two weeks as compared to the month, it is almost three times as much?

A I wouldn't extend the ratio that much.

Q But there is a substantial difference in the ratio between the two figures, isn't there, sir?

A Well, there is a difference. Whether you choose to use subtantial or not, I will leave to you.

Q Where are the reports?

A Let me point out, Mr. Mathias, that in the various ratios that I have computed on that page which were later transferred to A & P Exhibit 180, I have made no use of the month's total dollars.

Q That is what I mean. You have basically used the figures for two weeks; is that correct, sir?

A Yes.

Q Sir, you have explained how you arrived at the dollar value per point on line 7. What have you done with that figure, then, in connection with the total dollar value delivered as appears on line 6?

A As you can see, the dollar value per point was taken from the sheet we have just referred to where I regrouped stores by limited and full service categories. Return to A & P Exhibit 180, Column 7. The figure of $7,977.24 is divided by dollar sign .2998 to give us points delivered of $26,609. The same thing has been done in Column 13.

MR. FALLS: Just to make the record clear, I think you said $26,000. It should be points.

THE WITNESS: Points, 26,609 points. Doing the same thing in Column 13, you get 233,518 points.

By Mr. Mathias:

Q So, the number of points that appear on line 7, then, for the independent stores receiving limited service and the independent stores receiving full service are calculated figures. Is that correct, sir?

A Yes, except -- you mean on line 8?

Q On line 8.

A Yes.

Q There are also figures on line 8 for schools and other nonstore customers in Columns 14 and 15 of Respondent A & P Exhibit 180. How are they obtained?

A We went through the route books and picked out each school and multiplied the quantity of items taken by the corresponding point values to get 302,949. We did the same thing for other nonstore customers to get a point value of 108,108.

Q Where can we find that analysis, sir?

A You don't find it.

Q There are no work sheets showing the computation of these figures?

A No, sir.

MR. FALLS: Would this be the time to take a few minutes for a break?

MR. MATHIAS: This might be a good time.

JUDGE HINKES: Very well. We will take a short recess at this time.

(Whereupon, at 11:00 a.m., a brief recess was taken.)

JUDGE HINKES: You may continue any time you are ready, Mr. Mathias.

By Mr. Mathias:

Q Mr. Havemeyer, my last question before the break was concerning the derivation of the points delivered on line 8 for schools and other nonstore customers under Columns 14 and 15 of A & P Exhibit 180. Your answer for that, as I understand, is that this is your actual count taken from the route books; is that correct?

A Yes.

Q Did you check the entire month's route book, or is this a two-week projection?

A This is the entire month.

Q You took each of the products delivered to these customers for the entire month and assigned the appropriate point value to them and came up with these figures?

A Yes.

Q Now, staying on this same line 8, Points Delivered, I see over in Column 1 a certain number of points delivered to A & P stores. How was that figure arrived at, sir?

A That was a residual. Having identified the point value for the other stores or for all the other stops, namely, independent stores receiving limited service, independent stores receiving full service, schools and other nonstore customers and subtracting the aggregate of their point values from the total appearing in Column 17, we then were left with the volume delivered to the A & P stores as shown in Column 1.

Q So, this figure depends somewhat on your calculations of the point value to limited store customers and independent store customers as those calculations appear in ~~lines~~ columns 7 and 13; is that correct, sir?

A. Yes.

Q I note also under the A & P stores in Columns 2 and 3 on this same line 8 you have figures for private label number of points of private label and Borden label delivered. How were those points, numbers, derived at, sir?

A Using the billing summaries for Chicago and suburbs for the two weeks ending March 19th, we determined the ratio of private label points to total points and applied that ratio to points delivered in Column 1 to get points delivered in Column 2. Of course, the points delivered in Column 3 would be the difference.

Q In other words, you figured out the percentage represented by private label items and took that percentage of 1,026,278 which was the total and arrived at the figure in Column 2, then you subtracted that from the total to arrive at Column 3, is that correct, sir?

A Yes.

JUDGE HINKES: That is based on the figures of what period?

THE WITNESS: Two weeks ending March 19, 1966.

on line 8 was the elimination of five of the stores we had

By Mr. Mathias:

Q You did not use the route books, then, in working out any of these figures?

A No, we wouldn't. Because you see per instructions, drivers were not posting quantities in the route books. A few did in violation of these instructions on three different routes. Not all the routes. Fourteen of these 17 routes showed no quantities in the A & P route book pages.

Q There were quantities entered in the rear of each book, were they not, as to the amount of private label products loaded on the truck during each day of the month?

A I will answer that in general, yes, if you are going to be very specific. I would say I am not familiar with the details. When I say not familiar, I am not sure if the value shown in the rear of any particular book is in fact the total of all the point values delivered to A & P stores on that route. I don't think there is any way of proving that one way or the other.

Q In other words, you don't know that all of the points listed as being loaded were delivered to A & P stores. Is that what you mean?

A Yes.

Q Now, sir, to go back to Columns 7 and 13, you stated that the key change in the change of the various numbers appearing on line 8 was the elimination of five of the stores you had previously listed as independent stores receiving limited service in lines 4 through 7 and transferring them over to the group of stores entitled independent stores receiving full service, whose calculations appear in lines 8 through 13; is that correct, sir?

A Yes.

Q In removing those five stores from the limited service grouping, you removed approximately 50 percent of the entire dollar volume from that grouping, did you not, sir?

A Yes.

Q This morning, you identified for complaint counsel five customers who were the five customers who were removed from the limited service category. As I have them listed, they are: Theresa Crispino, T-h-e-r-e-s-a C-r-i-s-p-i-n-o; Dick's Cardinal, D-i-c-k's C-a-r-d-i-n-a-l; Bruno Nalepa, B-r-u-n-o N-a-l-e-p-a; Madison LaVeigne, M-a-d-i-s-o-n L-a-V-e-i-g-n-e and Bell Park Foods. Is that correct, sir?

A Yes, sir.

Q To go back to this work sheet in A & P Exhibit 171 for a moment, which you state is the analysis of the O'Hare Branch route books, I notice among the named customers at the top of that page is one marked Madison Food. Is that the same as Madison LaVeigne, or is that a different store?

Excuse me, sir. When I asked the question, I didn't have this in front of me. I will hand you Route Book 13, page 3.

paragraph A.

Q Would you read it aloud, since I don't have a copy in front of me.

A Yes. "That the Borden drivers delivered milk and dairy products to the cooler and display case at the Cardinal store." Then it speaks of two other customers, and it goes on to say: "And at each of these stores rotated stock and replaced out-of-date merchandise at no cost to the store and made out the store's order for next delivery after checking the point of delivery therein."

Q In the case of Theresa Crispino and Bruno Malepa?

A In the case of Theresa Crispino, it is page 2, paragraph C: "That the Borden drivers who delivered milk and dairy products to Theresa Crispino delivered inside the back door of the store in a room located in that area, replaced out-of-date merchandise at no cost to the store and made out the store's order for the next delivery after conference with the owner."

Q What elements there would transfer it from limited service? The dropping of the product off in a back room would accord with limited service, would it not, sir?

A But you are replacing out-of-date merchandise, and you have to handle merchandise, individual containers.

Q Is there any indication there was out-of-date merchandise?

MR. FALLS: I don't think the witness should be

Crispino, is there not, sir, and that is that this customer stated that he rarely had out of date merchandise?

A Is that in this stipulation?

Q I believe it is.

MR. FOLEY: Page 3, paragraph 6.

THE WITNESS: Yes, page 3, paragraph E. "That the replacement of out-of-date merchandise at Bill's Markets and Theresa Crispino was infrequent and involved only small quantities usually of the low-volume dairy by-products."

But the handling of containers, individual containers of merchandise as indicated for Crispino ---

By Mr. Mathias:

Q What do you mean by the handling of individual containers of merchandise, sir?

A I don't know how else to describe an individual container of merchandise.

Q Where in the stipulation, what mention is it of handling of individual items of merchandise?

A The words, "replacement of out-of-date merchandise."

Q So, the replacement of out-of-date merchandise and the billing procedure are the two items that caused you to place this customer in the full service category?

A Again, that was not the billing procedure. It is the order procedure.

Q The order procedure.

A Yes.

Q In the case of Bruno Nalepa, what portions of the stipulation caused you to change that particular customer from a limited customer to a full service customer?

A There were two principal points. The third point is sort of complimentary. I am reading from page 2, paragraph B: "That the Borden drivers who delivered milk and dairy products to Bill's Markets, Spot-Lite Markets and Bruno Nalepa delivered milk next to or in front of the dairy display case in these stores (which did not have coolers) and these stores did not receive rotation of stock."

Then I go on to page 3, paragraph D: "That the Borden driver who delivered milk and dairy products to Bill's Markets, Spot-Lite Markets and Bruno Nalepa replaced out-of-date merchandise at no cost to the store and made out the store's order for the next delivery after checking the dairy case and/or cooler (checking both if the Borden drivers delivered both to the display case and cooler)."

And perhaps I should apply a supplementary one, page 3, paragraph G" "That Theresa Crispino, Gene's Food Shop, Bruno Nalepa, Spot-Lite and Edward Truty were billed daily by the Borden drivers who delivered milk and dairy products to these stores and they paid the driver at the end of the week."

Q So, the daily collection and making out of the orders and lh 18

By Mr. Mathias:

Q At the same time, sir, if containers of different unit size of different point values were mixed to make a complete case, say pints of half-and-half and quarts of milk or buttermilk, your points per case would consider these individually as so many points of buttermilk, a certain percentage of a case of buttermilk and a certain percentage of a case of half-and-half, is that correct, sir?

A I don't know how to answer that, Mr. Mathias.

Q Well, you have already said if you had a half-case of a particular product in a delivery, it would have been considered as a half-case of that product; that is right, isn't it?

A Yes.

Q To go back to your calculation of distribution and loading expense and the computer runs to which you have referred us, at the present time none of the computer runs we presently have in our possession would be of any value in computing out the truck-loading cost which you have attributed to Mayfair in this case, is that correct, sir?

A That is correct.

their total purchases that would be being considered?

A Yes.

Q Now, sir, the next item in the comparison of A&P and Mayfair on the second page of Exhibit 170 is physical delivery. Where would we find the calculations in Exhibit 170 and companion exhibits, which would indicate how the various cost elements under this heading have been derived?

A In Attachment 3. I am going to turn back to this flow chart because I think occasionally it may be useful to refer to it in this attachment so, while you are formulating your question, Mr. Mathias, I will set this up.

Q Sir, before leaving Attachment 2 dealing with the truck loading expenses, to make sure that we haven't skipped anything, I notice that the first page of Attachment 2 was not discussed by you in any way in the course of your explanation of your calculation of truck loading expense as carried to the comparison of cost pages on page 2 of 170. Does anything on the first page of Attachment 2 have a bearing on that truck loading cost?

A Yes. On the first page of Attachment 2 as on the first page of each of the subsequent attachments we determine the proportion of dollars in that function which are applicable to store customers, because that is then later accumulated in Attachment 1 and is indicated on this flow chart of the overhead cost, so it's really your option, Mr. Mathias. We could discuss the first page of Attachment 2, but its results won't actually be used until we finally get to Attachment 1, which is where we apply the overhead or we could wait until we go through each Attachment and then return to the first page of each of those attachments in discussing the overhead costs.

Q Well, I note that there are a number of other pages attached to Attachment 2 following the various calculations we discussed yesterday and this morning. Would they all relate to this first page and the calculations thatyou have made on the first page?

A I can't answer that generally. I will have to look at the page.

No; there is one page in Attachment 2 which is specific to the first page of Attachment 2.

Q What is that, sir?

A It's next-to-the-last page in the attachment.

Q That is the calculation of regular wholesale loading costs applicable to non-store customers?

A Right.

Q Sir, there are a number of other attachments in here including various copies of various documents.

A Well, all of the other pages in Attachment 2, with the exception of this last one I just mentioned, are related not to the first page of Attachment 2, but to the page where we finally determine cost per case of 1362. We can run

through them --

Q Sir, you have not referred to them at any point in your previous calculations. It might be helpful if you could explain what use was made of that in arriving at this cost per case of .1362.

A Yes. All right. Just a second.

Q For instance, I note that there are copies of A&P Exhibit 74 herein which is the breakdown of the O'Hare routes through March 1965. I did not note any reference in your calculations to that page.

A Yes, there is a reference to it. Let me see if I can find it.

I can't seem to prove this out now, Mr. Mathias. I believe that Exhibit 74 was used to develop the number of -- Strike that, please.

That may be superfluous in this attachment and is not needed until Attachment 9. It may have been inserted there in error.

By Mr. Mathias:

Q These next three pages following that, at least in my booklet, are various A&P exhibits which we just received. The worksheet entitled "Calculation of regular wholesale loading costs applicable to non-store customers," are they related to that computation or do they have something to do with the earlier computation of cost per case?

A Well, of course, one of those is the long worksheet which is now 180.

Q I am referring to what was originally referred to as item 7.

A Which is A&P X-69 and item 13.

Q And item 13, yes.

A Well, now, you will see that item 13 for March 1966 is used in the page entitled "Analysis of O'Hare Branch Clerical Expense." You remember when we were talking about the vendor volume?

Q Yes.

A And also item 8, which is A&P X-70. That was used to provide information on the top line of that work sheet.

Q For the vendor sales?

A Yes. And A&P X-76 which is item 14 was also used. So those A&P exhibits were used as part of the development of the vendor volume for March of 1966.

Q All right. Then I will skip over for the moment the first page of Attachment 2 as you suggest, and take all of the first pages of the various attachments after we complete the other analyses, so, turning to Attachment 3, which is physical distribution expense, on Attachment 2, sir, where do we go to within that attachment to find out how you have calculated the physical delivery expense?

A In Attachment 3, you mean.

All right. There are two -- Well, let me put it this way. The purpose of the documentation in Attachment 3 -- I will refer you to this flow chart here -- is to get the cost per route day and then the cost per serving minute. Then as was illustrated in another flow chart, because it's briefly referred to now --

Q Do you remember what exhibit number that is, sir?

A A&P X-162. That illustrates the application of the time standard to the specific store we are concerned with. In this case the illustration was for Mayfair Foods. So that brings us -- the minutes per point opposite element 14 on A&P X-162 -- can you see that? -- corresponds to this delivery time per point in the flow chart A&P X-161.

Now, the calculation of the delivery time per point, which is set out here in illustrative form showing every one of the detailed steps, that calculation is the image your computer people have been studying.

Q They have looked at it, but apparently quite a few of those figures are now changed.

A Well, the basic program will not change because of the input data, what is called constant. The time standards, for example, will not change. The number of points that Mayfair took will not change. The number of cases that Mayfair purchased will not change. The number of delivery stops per month for Mayfair will not change. The proportion of glass will not change. The fixed minutes per stop will not change. The number of stops per month will not change. The collections will not change.

I'd say that the calculation of the time per point for Mayfair or for any of the other customers will not change, but the cost per serving minute will change as a result of yesterday's corrections.

Q Could we go through Exhibit 170 and go through the various steps that are involved here in determining the physical delivery expense for Mayfair and for A&P?

A Yes, sir. In going through Attachment 3 then of A&P X-170, we will be developing cost per route day as shown on one of these lower boxes on the flow chart of A&P X-161, and then we will take from A&P X-180 which was revised yesterday the number of serving minu-es and that is the purpose of that A&P X-180, the principal purpose in order to get the cost of serving minute.

So, as we go through Attachment 3 of A&P X-170, remember where we are headed for. We are heading for the cost of wholesale route day and the cost of serving minute. So it's basically accounting analysis as compared to time standards analysis. That's what we are going to go through in Attachment 3.

Q All right. Now that we are in Attachment 3, sir, what is the first step that we take?

A All right. As in the case of Attachment 2, let us skip the first page because that is eventually to be used in the overhead cost calculation.

To to the page entitled 1-A, Physical Distribution Expense Data, O'Hare Wholesale, March 1966, and this shows the type of expense which goes into the cost per route day, and that is the purpose of this page, is to develop the cost per route day.

When I say of this page, I mean and of its supporting documentation, and it includes the vehicle cost, building expense, delivery compensation, and related route operating expenses, delivery supervision expense. And the dollar amount spent in those categories in March 1966 are aggregated and, of course, we will go back to the source documents, but have in mind that the purpose of this then is to get the $55,333.05 total cost of operating the route structure or the route system in March which we will then divide by the number of route days which were operated to get the cost per route day.

Q All right, sir. Going to the various expenses which are involved herein, where do we find these various expenses?

A All right. Vehicle cost of $12,440.22 is taken from an expense ledger which is identified as Source 1, or the footnote 1, which is location 723 account 071 which is the attached document of $12,440.22.

Q So this is a part of A&P Exhibit 72, is that correct, sir?

A Yes.

Q And that would be, you said, accoutn number 723 location 071, is that correct?

A No. Location 723 account 071.

Q And the total appearing at the bottom of that page is $12,440.22, is that correct, sir?

A Yes.

Q I note that there are a number of credits included in the net activity column of this ledger sheet which would amount to $12,000-and-some, is that not correct, sir?

A Well, you have, I believe, a more distinct copy than I have, more legible. I see one of $10,944 transferred to budget, and I see one of 1535, I think.

Q 1565.98 ~~6598~~, thatis other expenses.

A Yes. There is one repair parts of $115 and there is one of -- I can't read the title, but it looks like $20.

Q Depreciation, and $20 credit.

A Yes, they total over $12,000.

Q And there is one repair parts, 115 dollars, which you mentioned.

A Yes.

Q Now, was any study made of this particular account, that is, location 723-071, over a period of time to determine whether or not these particular credits and this particular month were typical credits?

A Well, that same general answer as I have given before on questions of that type: You will notice that in the particular month which is March the net of all the debits and credits is $12,440.22, and that is roughly a third of the year to date expenses of $36,000, so it would seem that those credits are a part of the normal routine and are representative.

Q But that is only based on the comparison of those two figures. You have not compared thison a month-to-month basis with the location card for this particular location and account number?

A Well, I think that finding that one month is roughly about a third of a three-month expense indicatesthat what was spent for that month is a reasonable representation of the normal expenses and the normal credits and debits.

JUDGE HINKES: You say that third column is the year to-date, meaning the quarter ending March 1966, is that it?

THE WITNESS: Yes, three months, January, February, and March, three months.

By Mr. Mathias:

Q Do you know that this is developed on a calendar year basis rather than a fiscal year basis?

A I think it is.

Q But do you know, sir?

A Well, I am going to repeat, I think it is.

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Q But you do not know from your own personal knowledge that it is?

A I think it is, from my personal knowledge.

Q But you do not know for sure?

A I do not know for sure.

Q And you did not make an analysis of any other ledger cards for this location and this account number over any period of time?

A I personally did not. I have given a general explanation of that before whereby my staff did not perform an audit of the Borden accounting system. My staff was aware of the accounting system and of its routines, and was instructed to be alert for abnormalities.

Q But do you know from your own personal knowledge at this time whether any analysis was made of this particular account for other months in this general time period, 1966, before and after in March of '66?

A Well, I think I have to say that I assumed they did because that was a general instruction.

Q You do not know whether or not such an analysis was made?

MR. FALLS: It seems to me, Your Honor, that the question has been adequately answered.

JUDGE HINKES: I think it is quite apparent from the witness's answer just exactly what he knows and does not know.

By Mr. Mathias:

Q Now, sir, the next expense item is building expense. Where was that obtained, sir?

A From account 723-008. And that ledger card or a copy of it is also attqched.

Q And that ledger card shows a total of $2,016, is that correct, sir?

A Yes.

Q Now, sir, the next item of expense is entitled delivery compensation and related route operating expenses. Where was this figure obtained from, sir?

A I refer you to the next page following the ledger cards, the page called 1-B, which is a distribution of account 723-023. And the actual ledger card for that is behind it.

For example, on line 33 of page 1-B --

Q That is the work sheet?

A Yes.

Q Entitled Distribution of O'Hare Branch Deli3ery Expense?

A Yes. You will find a grand total of 45,116.51, and you will find on the ledger card which follows the same figure in the expenses for that month.

Q Sir, would you explain for us just what you have done on page 1-B of Attachment 3 in Exhibit 170?

A All right. Well, various sub-accounts and the money for those sub-accounts have been posted on the work sheet, page 1-B, from the ledger card to illustrate on the work sheet -- I have a line number that we will refer to later on -- and over in the middle of the page there is a sub-account number and that sub-account number corresponds to sub-account numbers on the following ledger card.

For example, on the work sheet you find on sub-account number 2, which is line number 2, wages, routemen, $14,409.10, and you will find the same figure on the ledger card sub-account 2.

And similarly values for expenditures for other sub-accounts on the ledger card have been posted to the work sheet which is page 1-B. All right.

So I will stay with page 1-B on the assumption that you will understand that sub-account figures, that is expense figures, have been posted to it from the ledger card.

First, we got a sub-total of compensation. That is on line 5.

Q And that included the wages of routemen, commissions, of the routeman, and the wages of the salesmen, is that correct, sir?

A Yes. And then on lines 6 through 10 we got a sub-total of the fringe benefits, and the reason we got the sub-totals from lines 5 and 10 was to devélop a fringe benefit percentage on line 11 which we will use later on.

So, so far I have posted the money spent for compensation and subtotaled it, and I have posted the money spent on fringe benefits and subtotaled it, and got a relationship of one to the other as shown on line 11.

Now I am going to continue down that list. Eventually I am heading towards line 36 because that is the amount of money, that $40,142.46 is the amount of money you will find on page 1-A, where we started our questioning.

Q Maybe, to simplify matters, Mr. Havemeyer, could you tell us what you have subtracted from the $45,000 figure which you said is the total from the ledger sheet to arrive at this $40,142.46?

A All right. I have subtracted out the product waste on line 32, which is sub-account 17, because I will treat that separately in another attachment, and I have subtracted the sub-total of selling costs on line 31, so, if you look at line 36, it says you arrive at $40,000 by taking the grand total of $45,000 -- and I am rounding off as I talk here -- on line 33 and subtracting from that line 31, subtotal selling and line 32, product waste, leaving $40,142.46.

Q Now, sir, you say you subtracted out the total selling cost and product waste. What have you included in this subtotal of selling costs that you have subtracted out?

A All right. If you will look at line 30, you will see that the legend there says you add lines 24, 26, 28, and 29; so let's go back to each of those.

Line 24 is the salary of the salesman plus a fringe benefit of 19.42 percent which is the fringe benefit percentage we determined up above. Then there --

Q That would give you a total salesman's compensation of 2286.

A Yes. Then there is a separate welfare account for selling personnel called Borden welfare sub-account 8.

Q The salesmen are not numbered?

A That is right. And then you have lines 28 and 29, the travel expense and the so-called other expenses associated with selling.

Q Sir, what on the ledger card location 723-023, or whatever evidence of record indicates that the travel expense listed under sub-account 36 and the other expenses listed under sub-account 50 are attributable to the salesmen's expense?

A Well, the vehicle expense of running the route system is separate in accounts 723-071, so this travel expense in sub-account 36 is not related to that. This is travel expense of salesmen and perhaps branch managers, but not of the delivery system.

Q Location 723 account 071 merely states "automotive expense."

A Yes, sir.

Q There is nothing therein that would indicate that it necessarily excluded the salesmen's cars, is there, sir?

the nature of these other expenses, wich are not otherwise described, to know whether they are salesmen or delivery or what-have-you. Now, how do you find that out, if you did it?

THE WITNESS: The detail that was available in the accounting system in '65 is not available in these cards. They changed their accounting system.

JUDGE HINKES: "These cards" being the ledger cards?

THE WITNESS: The ledger cards, in 1966. So I cannot refer back in 1966 to as much detail as was available to us in 1965. For some reason they changed this and provided summaries rather than detail, but I believe it is a logical assumption that there was a continuation although they changed their method of posting there was a continuation of the basic accounting method and the basic accounting charges in '66 as in '65.

Now, in 1965 I was able to get explanations because more detail was available. I believe that, if that detail had been available, I would have been able to andwer in that degree of detail in 1966. So we have a company which has continued in operation, it's continued in the same area, it's continued with branch operations in the area, it has changed its method of posting the figures so we do not have the detail in '66, but I believe the detail that we went through in 1965 indicates why this is properly associated with cost element.

JUDGE HINKES: All right, we will take five minutes.

(Brief recess)

JUDGE MATHIAS: You may proceed, Mr. Mathias.

By Mr. Mathias:

Q Mr. Havemeyer, the next item among your marketing cost elements listed on the second page of Exhibit 170 in connection with Mayfair Foods is "Branch clerical cost." Would you explain to us where we would find the calculation of that cost in Exhibit 170, sir?

A Yes. Please turn to Attachment 4.

Q Do we again ignore the first page temporarily and go to the second page?

A Yes. The purpose of this page is to develop the cost per delivery ticket which is shown by two-thirds of the way down as .7256. So this page and supporting documentation are for the purpose of developing that figure. We have previously gone through this page in attachment 2 for another purpose, and we went only as far as developing a figure in a blank space in the vendor column opposite the line captioned "Item 14, March 1966."

So I think I ought to start at the top, which you probably understand by now, but start at the top and work our way down.

In the first place, the first two lists of figures opposite the caption "Item 8, O'Hare, 5th period 1965", are taken from a Borden document which is A&PX-70 which is the next page, and you will see two groups of circled figures, the first one being dollars, dollars of expense for office cost --

Q Now, this is for the fifth period of 1935, is that right, sir?

A Right. The total is $5,758, and the other four figures to the right of that aggregate to that total.

Q These four figures appear under the headings "wholesale bulk", "wholesale vendor D.A." "Counter". Is that correct, sir?

A Yes. And those are the figures which are posted on the second line of data of this work sheet opposite the caption "Expense dollars". The figures on the first line of data on this work sheet opposite the caption "points" are also taken from A&PX-74 down at the bottom of the page, again a series of circled figures.

Q These again are sales points for fifth period of 1965. Is that correct, sir?

A Yes.

Q All right, sir, what is the next step then?

A Now, the third line of data on this work sheet is opposite the caption "Item 13, 5th period 1965", and this is from A&PX-75 which is the second page attached."

Q Again I believe there are corrections needed in the line numbers there. It would be 68 and 70.

A Line 68 and 70.

we just used that as a means of proportioning.

Q All right, sir. Now, you have obtained the $11,000 figure from the location 723, account 004 which is listed as O'Hare office expense on the chart of accounts. Is that right, sir?

A Yes, sir.

Q And what have you done with that, sir?

A Now, we have apportioned that among the four categories of business in the same proportion as the percentages shown on the line above the $11,000 postage.

Q In other words, you have apportioned 100 percent of that $11,000 figure to the four categories of sales entitled wholesale, bulk wholesale, vendor, and counter in accordance with the percentages you had computed on the line above. Is that correct, sir?

A Yes.

Q Now, sir, location 723, account 004 is the only office expense account for the O'Hare branch according to the chart of accounts which is ASPX-37. Is that not correct, sir?

A If we are going to get into that I will have to look at the chart of accounts. May I see that, pleaes?

All right now, Mr. Mathias, what would be your question?

Q I will repeat my question. Was the 723 subaccount ~~#2~~ 004 the only office expense account for the O'Hare branch? Is that not correct, sir?

A Yes.

Q Now, sir, the O'Hare branch also operated 33 retail routes according to A&P Exhibit 77. Is that not true, sir?

A 77? Could you show me 77, please?

Yes.

Q So there would be clerical expense for those 33 retail routes, would there not, sir?

A Yes, I would think so.

Q And they have not been apportioned or taken into account in your apportionment of the $11,000 office expense for O'Hare, branch for March of '66, have they, sir?

A No, they haven't, and I am trying to think of the reason for it.

To answer your question, none of the $11,775 has been apportioned to retail.

Q All right, sir. Going on now, sir, what is the next step in your calculations?

A Now we are estimating the number of delivery tickets or sales slips that would have been accumulated during this month and you may recall from A&P Exhibit 180 that there were 6,049 deliveries wholesale. That is found on line 3 of column 17.

Q Did this include the school deliveries included in column 14 of RA&P Exhibit 180?

A Yes.

Q And those school deliveries were computed in that instance on the basis of 27 delivery days, were they not, sir?

A That was based on the actual number of dleiveries to those schools during the month. We had a discussion on that this morning.

Q I stand corrected, sir. All right.

So you have taken that 6,048 figure from Exhibit 180.

A Yes.

Q And what have you dont then, sir?

A Then we estimated the number of delivery tickets on the two school routes which are not represented on A&PX-180. There were two school routes at 23 route days apiece. 46 route days at 20 per day equals 920 delivery tickets.

Q Sir, that 20 per day, does that mean the two routes were serving 20 schools or just what is the meaning of that?

A Yes, each route, 20 schools.

Q Each route served 20 schools, 40 schools altogether, then?

A Yes.

Q Sir, where do we find that information?

A Turn to item 12, which is A&PX-74, which is also -- I think it is the last page of that attachment.

Q Sir, this is the breakdown of the O'Hare wholesale routes for March of 1965. Is that correct, sir?

A Yes. There is the only source record we have of the number of schools by route, and in the left-hand column about halfway down the page you will find that it says school route No. 2, 4, 5, and 8; and as you read across to the column where there are some figures posted -- you probably have a better copy than I do. I think the figure is R16, 23, 18, and 22, respectively.

MR. FALLS: What?

THE WITNESS: 16, 23, 18, and 22 respectively.

By Mr. Mathias:

Q Were those the number of schools served on each of those routes at that time?

A Yes.

Q And in the interim period between March 1965 and March '66 the number of school routes had been reduced to two, is that correct?

A That is right.

Q Now, sir, what information do you heave that there were 20 schools per each of these routes?

A You mean the ones in March '66?

Q Yes, sir.

A We have no information specifically on that, but it would certainly seem logical that if they have separate school routes in March 1966 that they will structure that portion of the route system to be about the same as the route system for serving schools in March 1965.

Q One of these routes in March of '65 served only 16 schools Is that not correct, sir?

A That is right. And two served more than 20, so we used an average of 20.

Q But this is strictly an estimate. You do not know how many schools were served by the two school routes in March of 1966?

A That is right. Oh, wait.

No, I don't recall it as an estimate, I say it is based upon realistic data from March '65.

Q But you have no specific data for March of 1966, is that not correct, sir?

A No.

Q Now based upon this assumption you have calculated out 920 delivery tickets for the schools, for the two schools. Is that the effect of this calculation, sir?

A Yes. And you have added those tw 6,049 delivery ships that you have calculated out for all other customers on the wholesale routes. Is that correct, sir?

A Yes.

Q Now, sir, isn't it true that a substantial number of the customers on the regular wholesale routes were daily paying customers who paid the delivery?

A I have forgotten the number but there certainly were a number. I think we discussed this before and I don't remember what the number was.

Q I just want to establish that there were a substantial number of such customers at this time.

A Yes.

I am only quibbling about the word "substantial". I don't remember the number and I don't know how you characterize "substantial".

Q Well, on Exhibit 180, for instance, out of 72 independent stores you have 53 being listed as receiving daily collections.

A Yes.

Q Is that not correct, sir?

A Yes.

Q Now, sir, how have you used this total 6,969 which you have obtained by adding the data for the regular wholesale routes and the two schools?

A The amount of money allocated to wholesale, $5,056.45 was divided by the number of delivery tickets of 6,969 which equals $.7256 per ticket. I have to return to your question about cash customers. This question came up once before and I believe on redirect I indicated that there was also an activity associated with just cash customers that would not be associated with credit customers, so I don't believe that the fact that this money has been divided by the number of delivery tickets indicates that it is that we have overcharged.

Q The calculations in connection with the cash customers were not the identical type of service as was necessary in connection with charge customers. Is that not correct, sir

A Not identical.

All right, sir. Now you have arrived at a figure thorugh your calculations of approximately 72.5 cents per delivery ticket. Is that correct, sir?

A Yes. Another way of characterizing that would be 72.5 cents per delivery, although the word "delivery ticket" was used just because of what I said in the case of cash customers.

Q That is the branch clerical expense that we are talking about?

A That is right.

Q So according to your calculation for every delivery or every delivery ticket there would be approximately 72.5 cents branch clerical expense encountered in connection with the making of that delivery, or the making of that delivery ticket.

A Yes.

Q All right, sir. Now, in a previous calculation of a simialr sort in Exhibit 142 to 152 you stated that this bottom portion was not applicable to your calculations, this part on the private label iyems, the number of lines in private label, the number of lines on the whole ticket. Does that still hold true or have you used them in this calculation? 5

A I am going to need a moment to answer that.

We did use that, Mr. Mathias. First, you know we determined the cost for A&P under two conditions. Mainly the total business, that is, private label and Borden label combined, and then for private label only. Now, in the case of the total business, that is, private label and Borden label combined, the cost of roughly 72.5 cents per delivery ticket was divided by the number of points per delivery in order to get the cost for that condition.

In the case of the private label items only we apportioned that cost per delivery ticket between the two groupings of private label and Borden label items as shown in the first half of the bottom section of this page.

Q You took the number of lines represented by private label items, and the number of lines represented by Borden label items, which totaled 38, and apportioned to private label expense in accordance with the number of lines it represented as compared with the number of lines the Borden label represented, is that it?

A Yes.

Q And through this you assigned 28.95 percent of this clerical expense per ticket to private label sales, and 71.5 to Borden label sales. Is that correct, sir?

A Yes.

Q And then is there still any meaning to this bottom figure, that next calculation?

A No.

Q So you did not use the bottom calculation at all?

A No.

Q So we can scratch it out and forget about it.

Now, sir, having arrived at these various figures, how did you use these in determining the clerical expense of the individual customers, sir?

A We divided the cost per ticket of roughly 72.5 cents by the number of points delivered per delivery to the particular customer.

Q Sir, what figure in the case of Mayfair would you divide into this 72.5 cents in order to arrive at the clerical expense?

A 437.3819.

Q Your total points for delivery, that is?

Q Now, this didn't take into account in any way the number of lines that were used on the delivery ticket, if there was any, to Mayfair Foods, is that correct?

A No, because here we are talking about the entire delivery, all products.

Q Now, sir, in the case of Mayfair, at least in the original exhibit -- I dont know whether this figure has been changed or not -- this came to about .17 cents per point, is that correct, sir?

A No. You are off by a decimal point. 1.7 mills.

Q 1.7 mills per point?

A Yes.

Q Nos, sir, how was this figure arrived at for ASP? What figure was divided into this 72.5 cents to obtain the ASP figures?

A Well, if you divide .7256 by the A&P volume, total volume, and divided by 442 points, which is shown in A&P Exhibit 180, column 1, line 13, you will come up with a figure of $.001642, which you will find on all of the subparts of A&PX-181 under the column for A&P private label and Borden label combined. Not the first two pages, because that detail was not shown on the first two pages, but on A&P-180C through Z-5.

Q In other words, these are the figures that should appear in EXhibits 170 through 179 for A&P in each instance? Is that correct?

A Yes.

Q And that would be for the purchases of total private label and Borden label, is that correct, sir?

A Yes.

Q Now there is a different figure appearing under the column entitled based on A&P purchase of private label items only, is there not, sir?

A Right.

Q And how was that arrived at, sir?

A You divide .2101 which is in the section -- Well, in the section which apportions the 72.5 cents on the work sheet that we have been looking at for some time.

Q That is back in Attachment 4?

A That is correct.

Q Of Exhibit 170, where you have divided up this 72.5 cents per delivery cost between the 11 private label items and the 27 Borden label lines, is that correct?

A That is correct.

Q And you have taken the .2101 cost there and what have you divided it by to arrive at that --

A I divided by 197.8, which will be foundeon A&P Exhibit 180, column 3, line 13.

Q That is the points deliverd of private label?

A Yes.

Q Now, sir, in connection with this column in which you have computed out the branch clerical costs under the heading "Based on A&P purchase of private label items only", the branch clerical cost as computed for Mayfair is based upon its total purchase, is it not, sir?

A Yes.

Q That would be including the 11 products covered by the private label arrangement as well as others?

A Yes. Wait. Mayfair has no private label.

Q The 11 products covered by the A&P Borden private label, as well as other products?

A Yes.

JUDGE HINKES: Let me ask you, coming back to that work sheet in Attachment 4 where you divided up your delivery expense, clarical expense .7255 per delivery. You then broke that down based upon the relationship of the private label lines and the Borden label lines so that you attributed some 28 percent of the branch clerical expense to the 11 private label lines, and 71 percent to the 27 Borden label items?

THE WITNESS: Yes, this pertains only to A&P.

JUDGE HINKES: Yes.

Now, when you say the 11 private label lines you are speaking now I presume of quart homo and half-gallon homo and other private label items, but when you speak of the 27 other lines you are speaking of yogurt and so on that were never put under the A&P label but you are dividing that according to the number of lines without reference to the quantity involved.

THE WITNESS: Yes. Let's consider the function or the activity that happens in the clerical function. They are in the clerical function reconciling figures which are on lines Now, on an A&P delivery ticket there could be as many as 38 quantities posted, 300 of this and 20 of that and 60 of this, and so forth.

JUDGE HINKES: And 38 lines?

THE WITNESS: Yes, 11 of which might be private label items. Now it takes no more measurable time to multiply 300 by a price as it does to multiply 13 by a price, so the apportionment of the time per ticket between the private and Borden label is on a basis of lines.

JUDGE HINKES: Very well.

MR. MATHIAS: This would be a good time for a short recess, Your Honor.

JUDGE HINKES: All right. And let's make it a short one.

(Brief recess)

JUDGE HINKES: On the record.

By Mr. Mathias:

Q Returning for one moment, Mr. Havemeyer, to this portion of Attachment 4 in which you have computed out the analysis of O'Hare branch clerical expense, and down in this portion where you have apportioned the amount attributable to the private label lines, this calculation of yours where you take 11 private label lines and 27 Borden label lines, is based upon the premise, is it not, sir, that all 38 lines are normally used in billing to A&P?

A Yes. If you look at the billing summaries you will see that that is the fact.

Q Now, when you are talking about the billing summaries, there are individual store delivery tickets as well, are there not, sir?

A Yes.

Q And isn't that assuming that those individSual store delivery tickets use the 33 lines each day?

A Well, but remember, in the billing work that still there are individual tickets, when the bill is made up for A&P by the Borden clerical group it is a summary and the summary would include all those items.

Q Yes, but that summary summarizes a number of daily delivery tickets, does it not, sir?

A Yes.

Q And this assumption concerning since it is based upon your daily delivery slips assumes that the 38 lines are used on a daily basis by each store. Is that correct, sir?

A No, I think the assumption is a little different than that that is that the relationship between the number of private label items taken and non-private label items taken would be approximately in that 30-70 relationship.

Q Sir, the figure 6,049 above in which you have computed out the number of deliveries or delivery slips in some instances those include, do they not, sir, according to Exhibit A&P 180, 2,322 delivery slips to A&P stores for each one?

A Yes.

Q Now, isn't there an assumption built into your calculation at the bottom that on each of those delivery slips a total of 38 lines is used, 11 being private label lines and 27 being Borden label lines?

A No, I thought I answered that in the previous question, but let me try again. I said that it may not be an absolute number of 11 and 27, but it could be more likely a relationship of roughly 70-30 percent. For example, instead of taking 11 private label items every day you might have taken [illegible] and maybe 2% of Borden label. The relationship between the two of them would be more nearly alike.

Q Is this based on an analysis of daily delivery tickets or upon your assumption?

A It is based upon having scanned many route book packages. No, the delivery tickets are not available at this time but we scanned the route book pages where the data was available.

Q And now, sir, you did make an analysis of route book packages, did you not, sir, in connection with Attachment 5D, in Exhibit [illegible] Is that correct?

A Yes.

Q And would that be the scanning to which you refer?

A That would be some of it, plus the billing summaries, because not all the work is done on the delivery tickets.

Q No, sir. As a matter of fact, there is a delivery ticket then a summary billing made out in most areas. Is that not correct, sir?

A That is right, yes.

Q Now, sir, in the case of Mayfair you stated that -- and which is Exhibit 170 -- you stated that you took this 72.5 cents approximately per delivery tickets and divided that by the number of points per delivery in order to arrive at the branch clerical cost for Mayfair in Exhibit 170. Is that correct, sir?

A Yes.

Q Now, in the case of Exhibits 172 through 178 we have previously discussed in connection with your calculation of delivery cost the manner in which you arrived at a calculated figure of points per delivery for each of the other seven customers represented by Exhibits 172 through 178. Was that calculated figure the one that you used to divide into this 72.5 cents in the case of exhibits 172 through 178 to determine the branch clerical cost?

A You are referring to the calculated points per delivery?

Q Yes.

A Yes, that is the figure we used.

Q Now, in the case of Exhibit 179, which is the other 20 customers who are grouped together in one exhibit, again going down through the calculation of delivery cost in the fifth step of that calculation we arrived at a points per delivery calculation.

A Yes.

Q Now, in each of these instances, in the instance of each of the 20 stores in Exhibit 179 was that calculated figure of the number of points per delivery divided into this 72.5 cents to arrive at the branch clerical cost?

A Yes.

Q Now, in each of these instances in Exhibits 172 through 179, in the case of A&P in the column entitled "Based on A&P purchase of private label items only" this branch clerical cost was based upon the use of those 11 lines only in the delivery ticket. Is that correct, sir?

A Yes.

Q Now, sir, returning to Respondent A&P Exhibit 170 and the next item of marketing cost elements which you have listed, product waste, would you explain for us, sir, how that calculation was made?

A Turn to Attachment 5, please. And again let's pass by the first page.

Q All right, sir.

A As you will note here on this secone page, we come down to a figure of cost of returns per point of $.0010. So the purpose of this page and of the attached documents is to arrive at that figure.

Q I see, sir. I was looking at an uncorrected copy.

Will you pardon me just for a moment while I make some adjustments in some figures?

A Yes.

The "Total points sold, O'Hare wholesale", are taken from a familiar document which is attached. This is an A&PX-76 of 1,820,720. We are now going to deduct from that, as shown on this flow chart which is A&PX-165, we are going to deduct the points sold to stores receiving limited service, and that is what we will be doing in the next step, ad they were the points sold to A&P stores which would be found on A&X-165.

column 1, line 8. That is 1,028,278, and also the quantity sold to independent stores receiving limited service, which was found on --

Q It is column 7 in Exhibit 180.

A That is right, 26,609, their sum being 1,052,887. So when we subtract tha from the 1,820,000 the points which are eligible for a return privilege are 767,833.

Q Sir, what is the next step?

A We have taken from Account 723-23 the amount for subaccount 17, and you will find the ledger sheet 3 pages back.

Q Yes, sir.

A And there is a circled figure of $802.54 that has been [illegible], and so we divide the $802.54

JUDGE HINKES: You say you divide item 6 by item 5?

THE WITNESS: Yes, to get the cost per point.

JUDGE HINKES: The footnote says 6 minus 5.

THE WITNESS: Oh, I'm afraid in the typing the dot above and below the line was not typed on or did not reproduce.

By Mr. Mathias:

Q I take it this .0010 was then assigned to each of the competing purchases represented by Exhibit 170 and 172 through 179. Is that correct?

A Yes.

Q And the identical figure was assigned to every one, is that correct, sir?

A Yes.

Q Now sir, returning for a moment to this ledger entry, the expence for product waste, leakers were a form of product waste, were they not, sir?

A Yes.

Q And product spoiling within date would be a form of product waste as well, would it not, sir?

A Yes. I believe, however, that the truly defective merchandise, the leakers, were charged back to the plant. I don't remember what account number it would be, but that was considered to be a plant problem and charged back to the plant.

Q Can you refer to any ledger entry which would indicate that, sir?

A No. I am trying to recall where we find that. I can not point to a ledger entry at this time.

Q And can you recall any testimony by any witness that would indicate that was the case, sir?

A No.

Q Can you recall any specific exhibit that would indicate that that was the case, sir?

A Well, I believe we read something on that but I don't know if that has been officially received in the record here.

Q So at the moment you do not know of any specific exhibit that would show that?

A Well, I can't point to it. I am quite certain that my staff read such a description.

Q But at this time you do not know of any specific exhibit which would indicate this is the case?

A The reason I am not answering your question simply yes or no, is the words "I do not know". This has come up several times.

Q Well, sir, it is quite ---

MR. FALLS: Let the witness finish his answer.

MR. MATHIAS: He can say yes or no and then give an explanation, Your Honor. I believe I am entitled to an answer.

JUDGE HINKES: Let the witness tate his difficulty and we will see what the problem is.

THE WITNESS: Upon occasion, because of the many records , I can not recall if what we read or saw is in the record or not, so when you insist on my answering, do I know, in my mind I say I know we saw it, but I don't know if it is in the record.

JUDGE HINKES: Well, that should be your answer. I think that will suffice.

THE WITNESS: All right.

JUDGE HINKES: In other words, state what the situation is. You don't have to worry about tgiving a yes or no answer. If the question is, Do you know any specific exhibit in the record that has this information, you will say "perhaps"

I think I read it somewhere but I don't know where. That is it.

A All right.

By Mr. Mathias:

Q Now, the next item of expense listed in Exhibit 170, sir, is branch selling expense.

Can you tell us where we would go in Exhibit 170 to find the calculation of this figure, sir?

A Yes, the documentation in this attachment which is Attachment 6 is only one sheet or two sheets, namely, a work sheet and a ledger card or copy of a ledger card. We have from an earlier attachment, which I think is in delivery -- let me check that for you.

Q You are talking about page 18, of your delivery expense?

A That is right. You will find the dollar figures on the branch sales work sheet in this Attachment 6 to be a transfer of figures from page 18 in the section on delivery cost which is Attachment 3.

Q Those are the ones we discussed the other day which include the salaries for salesmen, fringe benefits, travel expenses, and other expenses from location 723, account 023. Is that correct, sir?

A Yes.

Q And you have come up with total of these sums in the amount of $4,171.51. Is that correct, sir?

A Yes.

Q Sir, just referring to your calculations on the second page of Attachment 6, branch sales support, and the four numbers you have there do not add up to the $4,171.51.

Q I believe you had an additional item included in that calculation in Attachment 3, that being subaccount No. 26 "Borden Welfare".

You seem to have left it out in this calculation.

A Yes. Thank you for pointing that out. The words "Borden Welfare" and figure of $28.34 should be inserted on Attachment 6, because the $4,171.51 total should conform to the amount on page 18 and then of course conform to the items which constitute the total.

Q All right, sir. Now what have you done with this figure $,171 .51?

A Excuse me. Let me pencil in that change.

That amount of money has been divided by the number of points deliverd to independent stores and their sum is 260.127, and that is the sum of 72 figure on A&PX-180, columns 7 and 13 of 233,518 and 26,609. And those are found on line 8.

Q So this page then has to be changed accordingly. I see that it has been in Exhibit 170 but my copy of 171 did not have the changes yet.

A Yes. On the line where it says "Total independent store points pwer analysis of route books", the figure 260127 aand correspondingly in the calculation down below the denomin should read the same and the result than is $.0160.

Q Now, sir, leaving aside for the moment any argument Complaint Counsel have with you as to the allocation of some of these expenses as sealesman's expenses, and accepting your position for the moment, it would appear that you have assigned this entire selling expense to only the individual stores in the wholesale routes at Borden. Is that correct, sir?

A Yes.

Q Now, there were other customers besides those independent stores on the wholesale routes, were there not, sir?

A Yes.

Q Does this mean, sir, that the entire time of the salesmen was spent in soliciting these particular store accounts and serving these accounts?

A Just a minute, please.

In order to answer that let me check something.

Well, first to answer that question, yes.

Q All right, sir. Now, referring to the testimony of Mr. Dishner at transcript page 7161, Mr. Dishner indicated that in 1967 and 1968 he was the sales director of the Chicago Meat Division and spoke of the function of his staff of salesmen. At transcript page 7161 starting at line 15 --

MR. FALLS: Wait, please, until I get that.

We don't have it here, go ahead.

By Mr. Mathias:

Q Starting at line 14, Mr. Dishner was asked by [[redacted]]

Wouldn't it appear that some of this selling expense should be apportioned to them as well.

A Well, you know that there is an account 725-23, 725 being the bulk routes at O'Hare and bulk institutions well, some of those other non-store --

Q But such accounts appeared on the regular wholesale routes of the Borden Company as well, did they not, sir, out of the O'Hare branch?

A Yes, but bulk accounts are typically considered -- not typically. Bulk accou usually require -- what will I say? A person who is more specifically knowledge of the bulk business.

Q But this expense was accorded to the wholesale routes which included non-store customers, did it not, sir?

A Yes, but I'm saying that bulk customers would more likely be serviced by a bulk salesman.

Q This is your assumption. There is nothing in the record or nothing in the chart of accounts that would indicate that any selling expense allocated to this particular account 723, subaccount 23 did not include sales to all of its customers.

A No, but neither is the reverse indicated. You say it is an assumption.

in the bulk wholesale market would indicate that the bulk wholesale business is considered to be a specialized business requiring specialized people.

JUDGE HINKES: But you are not in a position to tell us factually that location 723, acconnt 23 did not involve salesmen's expenses on non-store activities?

MR. WHITE: No, I can't say that factually. It is two things which lead me to my cocclusion.

JUDGE HINKES: I understand you have made a conclusion here. All I am asking for is can you tell us from the account that those salesmen did not do that function?

THE WITNESS: No, I can not tell you.

JUDGE HINKES: Very well.

By Mr. Mathias:

Q [illegible] right, sir. You have arrived at a figure which is now .0160, se[illegible] cost entitled Selling cost per independent store point", is that correct, sir?

A Yes.

Q And that is on this work page entitled "Branch Sales Support"?

A Yes.

Q Now you have transferred that in the case of each of the customers involved in exhibits 172 through 178 and 179 being all other 27 customers in the [illegible] assigned it to Mayfair [illegible], sir?

A Yes.

Q In other words, this is a constant that you have applied to each of these stores?

A Yes.

Q On a uniform basis?

A Yes, sir.

Q Do you know in each of these instances where you compare the expenses of the competitor to A&P, under branch selling expense, the selling expense under the column headed "Mayfair" or "Joseph Michalowski", or whichever customer it is, takes into account the purchase of the entire product line taken by that customer rather than only the 11 products covered by the A&P Border agreement?

A Yes.

MR. MATHIAS: Sir, it would seem that it is after 4 o'clock and we have reached the end of one of these expense elements. I think it is a good time to take a break until tomorrow.

JUDGE HINKES: Very well, let's recess at this time and resume tomorrow at 10 a.m. and we will run through as planned.

(Whereupon, at 4:05 p.m. the hearing was recessed, to reconvene at 10 a.m. Friday, May 10, 1974.)

you will refer to A and PX 73, which was previously known as A and P Item 11, there is a series of 12 fiscal statements, and the first one reads: Period Number 1, five weeks ending January 30, 1965. Period 2, four weeks ending February 27, '65. Period 3, four weeks ending March 27, '65. Period 4, five weeks ending May 1, '65, and so on through to Period 10, which is five weeks ending October 30, 1965.

The statements for Periods 11 and 12 do not actually show the closing date, but you can see that there are 10 periods where their period ending closely corresponds to the month ending, so their fiscal year and calendar year would be the same.

Q All right, sir. Now, at the end of yesterday's session, we were discussing the calculations of the marketing cost element in Exhibits 170 through 179, entitled "Branch selling expense," and it was noted that, in the case of A and P, in each instance there was no branch selling expense.

Now, sir, in connection with your calculation of the selling expense to these various customers and especially in connection with your allocation of the selling expense to A and P, you have not here taken into account the time and expense Mr. Warr extended in connection with the A and P account, have you?

A Not in this specific calculation, no.

Q Nor have you here taken into account any of the expenses of Messrs. Malone, Winkler, Goss, and others in connection with negotiating the A and P contract and later price increases, Q Now, you have subtracted from that the figure you have calculated above as not being affected by Borden advertising, is that it?

A Yes, and the result, then, is the points or volume affected by Borden advertising.

Q And that is 6,890,855?

A Yes. Now we conceptually turn our attention to this next box on the flow chart, which is the average year-round advertising per wholesale point, which appears on A and PX Item 11, which is A and PX 73, line 21. A copy of that document should appear about the fourth page behind this work sheet.

Q That was CX-54-B?

A No, I don't think so.

Q Oh, I see.

A In any case, a clear copy of this, I think, is about the fourth page behind this work sheet.

Q I have a copy of it, and that is what exhibit?

A A and PX 73, line 21. Under the column "Year to date" and on the line entitled "Advertising expense," you find the expenditure here in terms of cost per point.

Q Sir, looking at that sheet from A and P Exhibit 73, that is for December 1967, is it not, sir?

A Yes. We are using a year-round figure here inasmuch as a particular month figure might not be representative.

Q All right, sir.

A So the circled figure of point 0004 has been multiplied by the total number of points in that area which, on my work sheet, is on line 16, so the next line, line 19 on my work sheet, reads, not 17 times 18, but 16 times 18 estimated annual advertising expenditure of $4,694.53.

If I now divide that amount by the number of points affected by Borden advertising and which appears on line 17, I have the cost per point for Borden-label, dollar sign point 0007; and, despite all the changes on this work sheet, it does not change the original result. If you carry that out to further places, it is point 00067. Rounded off to the four places, it is point 0007.

Q Now, this figure you have posted under the "Advertising expense" for each of the customers other than A and P in Exhibits 170 through 179, is that correct, sir?

A Yes.

Q Now, sir, I notice that, in the column entitled "Total A and P purchases of private-label and Borden-label," you have assigned an amount of point 0004.

A Yes.

Q How was this arrived at, sir?

A What should be the result of multiplying point 0007 by the ratio of Borden-label points to total points going to A and P stores as shown in A and PX 180.

Q So going to 180, the ratio you computed out was -- or did you compute out a ratio? For the percentage of Borden label to A and P label, it is not computed out there?

A No, but I can tell you. If you will divide 566,956 Borden-label points in Column 3, line 8 --

Q That is, of Exhibit 180?

A Of Exhibit 180 -- by the 1,026,278 in Column 1, line 8, that ratio times the figure of point 0007 equals point 0004.

Q Sir, now let's turn to the various documents from which you obtained your basic data. Going to line 16, where you took the total, what is listed here as total wholesale points, Chicago alone, this is from the second page of A and P Exhibit 75; and, as I look at that page, line 72, from which you took that figure, is a total of both retail and wholesale sales.

A Oh, yes. Thank you.

Q Is that not correct, sir?

A That is right, sir, and you are right. That line should refer to total points in the Chicago area.

Q Sir, retail sales are affected by advertising, are they not, sir?

A Yes, and I am agreeing with your comment that this should have read "Total points in the Chicago area."

Q So that they are included in this 6,090,000 figure?

A Yes, but the figure is correct and that line should have read "Total points."

Q All right. Now, sir, in the case of Commission Exhibit 75, a figure of .0007. The source item, if I read it correctly, is line 19 divided by line 18, and this I don't follow now.

THE WITNESS: All right, sir.

Let me explain the logic. In the Borden accounting system -- and this is typical of dairy accounting systems -- there is considerable averaging, and so their expenditure was expressed as an average of all points, all kinds of points, and that is why it comes out to .0004. But we are saying that some of those points from which this average was determined in fact were not affected by the advertising, the private label, the schools, counter sales and so forth.

Therefore, the .0004, while based upon 11 million points when applied properly on a smaller number, namely, points affected by the Borden label advertising of 6,900,000 approximately, then becomes .0007 for those points which are affected by Borden advertising.

JUDGE HINKES: What you are using really is line 16 and 17, not 19 and 17?

THE WITNESS: I don't think so.

JUDGE HINKES: Line 16 being the total points and line 17 being the points affected by Borden advertising which is the formula you say you used.

THE WITNESS: Line 19 is the amount of money which .0004 represents.

JUDGE HINKES: All right.

chart for this attachment is A&P Exhibit 168.

Q All right, sir. Maybe we could just go down through the calculation, since we have been through the flow chart before, and if there is any necessity to refer back to the flow chart to show why a particular calculation was made, you can do so.

A Oh, all right.

Q It might be more direct and quicker just to go down through your calculation. I take it that appears on the second page of Attachment 8 to Exhibits 170 and 171; is that correct?

A Yes. All right. I thought if we knew where we were heading by looking at the flow chart it might make the numbers have some meaning as we went through the calculations, but the merchandising expense is taken from a ledger account which is attached to the following sheet in this attachment, $3,965.

Q What ledger account is that, sir?

A 10-730-032.

Q The "10" that you have referred to, that is an item number, is it not, sir, rather than part of the account number?

A Yes, item 10, excuse me, 730-032.

Q So this is a part of Exhibit 72, I believe, is it not, sir, A&P Exhibit 72, one of the ledge sheets in that exhibit?

A Yes.

Q And that location 730-032 is the Chicago main office merchandising account; is that correct, sir?

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A Yes.

Q And you have taken the summary figure shown on the bottom of that ledger card for the month of March 1966; is that correct, sir?

A Right.

Q And you have posted it on the first line of your calculation, $3,965.

A Right.

Q Now, what have you done from there, sir?

A Well, now we have taken the data for O'Hare whossale total points from A&P-76, which is the second sheet attached to this work sheet, and you will see a circled figure there opposite the word "O'Hare," and we are now going to subtract from that the sum of several figures.

Those figures are the school route points at O'Hare of 123,988, and we went through that previous attachment.

Q You won't need to make the corrections again. That was again taken from your calculation in Attachment 2, I believe it was?

A That is right. And that same number appeared in Attachment 7. And again as in Attachment 7, we took information for the school points on store routes from A&P Exhibit 180, the other non-store points from A&P Exhibit 180, the private label points from A&P Exhibit 180 going to A&P and the Borden label points going to A&P in A&P-180. These points then did not

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Exhibit 170 and 171 which we referred to in connection with several of your attachments yesterday?

A Yes.

Q And it would appear that the figure you have applied for Mayfair as the average list price per point in the two sets of columns on the second page of 170 is a figure appearing under the title "Value Per Point" ---

A Two-week period.

Q "Two-week period" in the next to last column on that work sheet in Attachment 8.

A Yes.

Q Is that where we would go to find this average list price per point?

A That is right.

Q And in going to Exhibits 172 to 178 would we find the average list price per point in those exhibits in this same column behind the respective customers represented by those exhibits?

A Yes.

JUDGE HINKES: I don't find that work sheet that you are speaking of in Attachment 8 to 170.

THE WITNESS: May I help you, sir?

MR. MATHIAS: It is very far back and it is a little difficult to locate. I think if you see it you will recognize it from discussions yesterday.

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By Mr. Mathias:

Q Now, sir, where did you obtain the average list price per point for A&P private label items?

A Well, it willbe from data in the back of this A&P Exhibit 170, about four pages from the back.

Q Is that the page entitled "A&P Store Summaries, Chicago and Suburbs, Five Weeks Ending 4/1/66, Price and Discount Analysis"? Or do I have the wrong page?

A Yes, that is the page.

Q That is the page? Where do we find on that sheet the average list price per point for A&P private label items only?

A I don't think it appears as that figure and I think you have to calculate it.

It should be a value, first dollar value shown under the five-week total on the right-hand side of the page, where you see a subheading called "Value at List Price," and opposite the caption, way over on the left-hand side, "Private Label Items, 244,873.18, and I must now have the points associated with that.

I am going to have to check on that, Mr. Mathias. I can't give you the answer right now.

Q Well, can you tell us the procedure that was followed, sir? You referred us to a value at list price over here in the right-hand column of this page as which appears to be on this page, $244,873.18; is that correct?

to A & P to all of the products delivered to the allegedly injured customers.

However, inasmuch as complaint counsel had made an analysis of the prices paid by A & P for its private label products, we then felt that we had to conform to that by separating our cost analysis of distribution to isolate or allocate the cost associated with the private label products. Accordingly, we made that analysis.

A. So, to recap, we did study the entire transaction first, and compared the cost of all products delivered to A & P versus the cost of all the products delivered to the allegedly injured customers. Then, because of the nature of complaint counsel's presentation to the case, we then separated the cost of private label products delivered to A & P.

Q Subtract the Government's comparison of private label discounts versus total product discounts for other customers?

A Yes.

Q The next point -- and these again will be some discreet points, Your Honor, just touching on the various aspects of the earlier testimony.

Let me direct your attention, for example, to A & P Exhibit 170, which is the documentation book on Mayfair Foods, and particularly to the calculation of truck loading costs and that aspect of it where you employed a sheet entitled at the top, Analysis of O'Hare Branch Clerical Expense. You testified that you utilized that in determining the quantity of vendor sales, or the point of value of the vendor sales for March of 1966?

A .Yes.

Q Do you recall that?

A Yes, sir.

Q That was a fairly complicated analysis on that sheet entitled Analysis of O'Hare Branch Clerical Expense. Why did you use that particular mode of calculating vendor sales for that purpose?

A Well, it was necessary for us to determine the volume that was sold through vendors. Because the truck loading expense was associated with several of the categories of sales. That is, wholesale, bulk wholesale and vendor.

We found no record where there was available for us to read or pick off the vendor volume for March 1966. Accordingly, we went through the apportions process, as indicated on that work sheet.

Q In other words, there was no other source that you could find for that particular piece of information?

A That is right.

Q Now, turning to a sheet, again in A & P Exhibit 170 --- the sheet has been referred to a number of times -- titled, Analysis of O'Hare Branch Route Books Non-A & P Stores Routes 3W, 13W and 18W. That appears in the section dealing discount per point.

JUDGE HINKES: Did you have any other questions, Mr. Mathias?

MR. MATHIAS: No, Your Honor, not at this time.

JUDGE HINKES: Very well. Mr. Falls, you may go on to your next group.

MR. FALLS: Mr. Havemeyer, did you do an analysis of the costs and discounts of the allegedly injured customers in the Hammond area similar to the one you conducted with respect to O'Hare?

THE WITNESS: Yes, I did.

MR. FALLS: Let me have marked as the next A & P Exhibit a four-page sheet, entitled, "Documents Used by Case & Company in Comparing Borden's Costs of Servicing Its Non-A & P Customers on Its Hammond Branch with Borden's Costs of Serving A & P Stores on the Hammond Branch."

(The document referred to was marked for identification as A & P Exhibit 182.)

By Mr. Falls:

Q Do you have a copy of that before you, Mr. Havemeyer?

A Yes.

Q Could you tell us what that is?

A These are documents which we used in comparing the costs and prices of A & P versus non-A & P stores on Borden's Hammond Branch.

Q That is a listing of the documents?

A Yes, that is a listing of the documents.

MR. FALLS: I would like to mark as A & P Exhibit 183 a sheet entitled, "Summary of Differences in Marketing Cost and Difference in Prices on Borden's Hammond Branch, October 1969."

(The document referred to was marked for identification as A & P Exhibit 183.)

MR. FALLS: I would like to mark as A & P Exhibit 184 a sheet entitled, "Summary of Joseph Tittle & Sons."

(The document referred to was marked for identification as A & P Exhibit 184.)

By Mr. Falls:

Q Mr. Havemeyer, let me ask you to look at Exhibits 183 and 184 and ask you if those are documents prepared by you or under your supervision?

A Yes, they are.

Q Can you explain to us what they show?

A A & P Exhibit 183 -- excuse me. Let me refer first to A & P Exhibit 184. This shows as an end result the degree of justification per private label point of A & P versus each of the four Tittle stores at Highland; Lake Street, Hammond; Village Court in Gary and Valparaiso, Indiana.

It also shows a four-store total. That four-store total -- I am sorry. Each of those four stores have also been

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brought forth to A & P Exhibit 133, which also shows the results of the other allegedly discriminated customers in the Hammond area. More specifically, Burger's Food Market, Model Food Center, Wallies Market and Wilco Food Center.

So, A & P Exhibit 183 is a summary of all the stores selected by complaint counsel, and 184 is of just the four Tittle stores.

Q Do the figures on A & P Exhibit 183, like the figures on the first two pages of A & P Exhibit 181, reflect in each instance the difference between the price per point as between A & P and the allegedly injured customers minus the difference in cost per point?

A Yes, it does.

Q It shows in each instance, therefore, that the difference per point in cost exceeded the difference per point in price by the amount indicated?

A That is right.

Q Now, in your analysis of the Hammond stores, did you follow generally the same principles and techniques which you used in your analysis of the O'Hare stores?

A Yes, we did.

Q With respect to the analysis of physical distribution costs, was there any difference in the mechanism employed, or in the techniques used? If so, what?

A Yes, there were some differences. Not in principle, as I indicated in my previous answer, but due to the specifics of the situation. That is, 12 of the 14 stores in this Hammond area were served by store routes typical of the type that we had talked about in the case of O'Hare. In addition, there was another A & P store on a so-called mixed route. That is, the Hammond Branch had routes which served -- as they called it -- the canteen stops.

There was also one route which served a mixture of canteen stops -- I believe two stores -- and one of those two stores was an A & P store.

Finally, there was another A & P store in Valparaiso where Mr. Tittle had one of these stores. These stores, among others down in that area, were served by an independent distributor who was not a Borden employee. So, in effect, it was almost like three little substructures of route distribution within the so-called Hammond Branch.

So, they were served off of three different kinds of routes. So, to that extent, it was necessary to study these routes separately and to apply their unique costs to the stores in the consideration.

Q So, the 12 of the A & P stores were served by route or routes similar to the O'Hare route?

A Yes.

Q One was served by this canteen, mixed route and independent distributor?

A Yes.

Q Were costs used for the A & P stores an average based on the cost of service of all 12 stores?

A Yes.

Q Was there any difference between the O'Hare studies and Hammond studies in terms of the A & P products which were being compared with the private independent store products or vice versa?

A Well, in this case, since complaint counsel had specifically targeted on the private label products for A & P and the equivalent private label products for points for the independent stores, we similarly applied our analysis to that classification of products.

Q So that in this instance, the comparison was of the A & P private label purchases against the independent store purchases of those same products?

A Yes.

Q Now, in your discussion of O'Hare, I think you indicated that with respect to eight stores there was a very detailed analysis made, and with respect to another 20 stores, there were some averages used for certain items as, for example, points per case?

A Yes.

Q Were there any average figures used in the Hammond studies?

A No. In this case, we analyzed each customer separately.

MR. FALLS: Now, I would like to mark a series of documentation exhibits similar to those we had in O'Hare. As a matter of fact, Your Honor, maybe this would be a good time to take the morning recess while I and the reporter mark these.

JUDGE HINKES: Very well, let's do that.

(Whereupon, at 10:55 a.m., a brief recess was taken.)

XXXXX

(The following documents were marked for identification off the record.)

A & P Exhibit 185, a bound volume entitled, "A & P Hammond."

A & P Exhibit 186, a bound volume marked, "A & P Mixed Route."

A & P Exhibit 187, a bound volume entitled, "A & P Valparaiso."

A & P Exhibit 188, a bound volume entitled, "J. Tittle, Valparaiso."

A & P Exhibit 189, a bound volume entitled "J. Tittle, Lake Street."

A & P Exhibit 190, a bound volume entitled, "J. Tittle, Highland."

A & P Exhibit 191, a bound volume entitled, "J. Tittle, Village Court."

A I have them with me.

Q Please turn them over.

A I just want to make a note of the listing numbers I am going to give you.

I will give you the computer programs which are called CCC-7, CCC-8 and CCCX-2.

Q Sir, when were these computer printouts prepared?

A Last week, dated May 4th. I guess that is last week.

Q May 4th. How long have you had them in your position here in Washington?

A I think since either Thursday or Friday.

Q Sir, complaint counsel would like to note for the record again that we are being turned over data which we asked for some time ago, at the time the exhibit is being presented on the record. This is not in keeping with Your Honor's orders, and it certainly hampers and deters our ability to properly have voir dire and cross-examination on these matters.

Mr. Havemeyer, turning to the third page of Exhibit 185, as I have it, which is the first one of the comparisons of cost elements in this instance between A & P and Burger's. I see in subsequent pages, the other named customers who appear in the various exhibits, Exhibits 186 through 186 have pages representing them.

In the first marketing cost element appearing thereon, truck loading, appears that in each instance on each one of the comparison pages, with the exception of that dealing with the Valparaiso A & P store and Joseph Tittle and Sons Store, that you have determined or allocated on truck loading, cost per unit of .0015 dollars. Is that correct, sir?

A Yes.

Q This is in some contrast to your computations in the O'Hare Branch, wherein each instance, there were different loading costs for each of the customers. Where do we turn to in Exhibit 185 and what other of these identified exhibits to find the calculation of the truck loading expense for these stores other than the Valparaiso stores?

A Before I answer that, I am going to suggest that we might do something now that we talked about last week with regard to O'Hare. That is, page numbering. Because my own notes make references to page numbers. This book of documentation was not as easily segregated into attachments as in the O'Hare case, and the previous analysis.

It might be appropriate that this should be done on or off the record, to do this page numbering so that we are always referring to the same page. Otherwise, I will describe the page by title.

MR. MAZELAS: I wonder if A & P counsel has a numbering machine available to them. We can take an early lunch period and they can get a numbering machine and go would allow us to follow through the numbers. Without them, our computer division can't make heads or tails of these figures.

JUDGE HINKES: Can you supply those documents, Mr. Havemeyer?

THE WITNESS: I assume we can. I am not a computer specialist so I asked them to give me the programs and I just assumed you had what you needed, so I will ask for them.

JUDGE HINKES: Let us know what you find out.

MR. MATHIAS: As long as you are checking on those, make sure that is all of the computer programs as well so we don't have to come back another time for those, if there is one or two missing.

By Mr. Mathias:

Q Now, turning to RAPX 185, page 3 -- actually, it is pages 3 through 9, in which you list various marketing cost elements for A&P private label and for a number of other stores for the equivalent of private lable, I take it that means the equivalent products of the A&P private label -- is that correct?

A Yes.

Q Under truck loading expense, I note that in each of those pages, 3 through 9, in Exhibit 185, for identification the same truck loading expense of .0015 is attributed to all of the customers, both A&P, and the other name customers. Is that correct, sir?

A Yes.

Q How was this computed, sir?

A By dividing a cost per case by the number of points per case for the private label items.

Q That was in the instance of each of those customers?

A Yes.

Q And in each instance, it came out to this .0015?

A Yes.

Q Where would we find that computation in 185 or any of the other exhibits identified this morning?

A If you will turn to page 125 -- you will --

Q Sir, would you explain to us what you have done on this page?

A You will find the first line described there is Truck Loading, on the right hand side, under the column entitled Facto Amount, the figure $.0371. That is the truck loading cost per case. All right so far?

Q How have you arrived at that figure, sir? Lets go back to the beginning. Would you tell us just how you got to that point?

A That is determined -- stay on that same page -- by dividing the dollar amount in the first column, $906.31 by the number of cases under the column entitled, Basis of Distribution to

Marketing Cost, and that becomes -- well, $906.21 divided by 24,418 is $.0371.

Q Now, sir, where did you find the $906.21 figure? Where did you obtain that?

A Will you excuse me. I have to locate it. Turn to pages 141 and 142. Try to imagine these 2 pages being side by side like that. They were originally a long spread sheet. To keep it manageable, we broke it up into 2 sheets. The second sheet, 142, the upper portion of the page, you will see, under the heading Platform and Loading, and then under the subheading of Total, a figure of $906.21. On line 7, where it says, Total, with a line and a column, Total, coincide or intersect, a figure of $906.21, and that is the figure which appears on -- that is the dollar amount which appears on page --

Q 25, sir?

A Yes. I am going to be slow in page references because mine is numbered differently than yours. If I slip occasionall I will try --

Q Sir, to speed things up a bit, I see where you got the 675.2 that appears under Labor on page 152, A&P Exhibit 86, which is an accounting sheet for Hammond for October 1959, there is one of the items listed as wages, platform and load 675.72. Is that where you obtained that?

A Yes.

Q I take it this 675.2 should be .72. Is that correct?

A I have .72 on mine.

Q Mine is blank at that point.

A I am sorry. 675.72. That is the applied labor.

Q Sir, you have added to that, apparently, fringe benefits to the extent of 34.11 percent?

A Yes.

Q Where have you calculated out that figure, sir?

A Go back to page 141, and you will find -- not the extreme right hand side, but the column next to Column C, at the bottom, a ratio 34.11 percent, which is determined by dividing $3,452.90 by $10,122.40, and you will see the $3,452.90 coming from a figure further up in that column -- I think it is about line -- well -- $3, --

Q That is the total of those items that are bracketed as fringe costs, being union and other benefits -- those are lines 20 through 23. Is that it?

A Yes.

Q Union and Other Benefits, Unemployment Insurance, FICA, Borden Benefit Program, and Insurance,Workman's compensation -- Is that it?

A Yes.

Q Those are the items which are accumulated to total the $3,452.90?

A No. That is not quite it. They total $1562.22, and you add to that figure, further up in that column, $1,090.00.

Q Where do we find that figure, sir?

A Further up in the same column there is a bracket opposite lines 4 and 5.

Q That represents wages, miscellaneous, sick pay, etc. -- wages, vacations and holidays?

A Yes.

Q Then, the $10,000 figure is, I take it, the wages -- that is the first 3 lines on page 141?

A That is right.

Q Wages, supervision, route salesman wages, platform and load -- is that it?

A Yes.

Q All right, sir. Now you have $9996.21, and you have carried that back to page 125?

A Yes.

Q Now, this estimated cases loaded for the 3 store routes and the 3 canteen routes -- what do you mean there by the term, "estimated", sir?

A Just a minute, please. I have lost my place. Well, that did not come from a Borden accounting record or statistical record and we calculated the number of cases based upon points per case and the point volume.

Q Where did you do that, sir?

A All right. Please turn to page 24.

Q All right, sir.

A The second column from the right which is headed, Cases Per Month. As you notice, this whole page is entitled, Hammond Customers, October 1969, and there are 3 groups of customers. The first group are the Complaints Customers, the second group are the Other Non-A&P Non-Complaint Customers, and the third group are the A&P Accounts. On the bottom of the column headed, Cases Per Month, you have a figure of $19,597.71, and that, when rounded out to $19598 is the figure that should appear on page 125.

Q $19,598?

A Yes. I notice that has been posted as $19,592. I only assume that is a clerical error. I am referring, now, to page 125, the figure of $19,592 should read $19,598.

Q Now, that is an accumulation of the volume served to all customers on these 3 wholesale routes out of Hammond in the month of October 1969. Is that correct?

A Yes, on the store routes.

Q That is cases per month?

A That is right, on the 3 store routes.

Q Where do we go to find the next figure, which, I take it, is that for the 3 canteen routes?

A This is an instance where we don't put all of the detail in this folder, and we go to the so-called mixed route folder, which is A&P 126.

Q This is a rather short one. Maybe we can take a couple of minutes off the record and paginate it. There are not many pages here, rather than try to --

JUDGE HINKES: If you think it is necessary. I was hoping, on the shorter ones, we wouldn't have to bother, but if you think it will help, sure.

By Mr. Mathias:

Q Well, lets see if we can do it without it. I would rather not waste time. What page would we go to in Exhibit 186 to determine this data?

A Just a second, please. There are 3 pages we will go to and one is headed, Route No. 2, which is about the 5th or 6th page, about, back.

Q 11-1 to 11-14-69?

A Yes, at the bottom you will find, Number of Cases 107.22.

Q That is the number of cases?

A Yes. And going back another 3 pages, you will find, Route No. 1, the same style of page, 529.43 cases, and going back another 3 pages, there is a figure of 498.30 on Route No. 9, so these are the cases as calculated by us on those 3 routes.

Q That is for a 2 week period. Is that correct?

A Yes. Now, when you round those up and remember that is for 2 weeks, so there are 12 deliveries in those 2 weeks --

divided by 12, and multiply by 27, because 27 delivery day month -- you should come out to 4,826 cases.

Q When we do that we come out with a different number, 4,804. So anyway you arrived then at a total of cases loaded between the 3 store routes and the 3 canteen routes. Is that it?

A Yes.

Q Then you divided that into the amount which you had in the first column, $906.21. Is that it?

A Yes.

Q And arrived at a figure $.0371?

A Yes.

Q And that is the amount you have carried -- no -- wait a second.

A That is the cost per case $.0371.

Q All right. Now, what have you done--

A We divided that by the number of points per case, which we will find -- lets see -- turn to page 88, please, which is a recapitulation of the invoices for Mr. Berger, Berger Supermarket -- on the third line you find, Points Per Case, Private Label, 24.5424.

Q Yes.

A And that divided into $.0371 will give you the cost of $.0015.

Q Now, did you figure this out for each of the stores?

I see, for instance, there is a similar page 85, 86 and 87, similar figures for Joseph Tibble & Sons, although slightly different than the 24.54 figure that you have just mentioned, and in 89, 90 and 91, similar calculations are made for Medal and Wilco?

A Yes. You will notice, for all of them, the points per case is about 24 plus, and whatever minor variation that might have caused in the result of the division, if it did come out to a slightly different figure, we kept it at $.0015.

Q What about the A&P points per case. Where did you calculate those, sir?

A Let me see. If you will turn to page -- excuse me just a minute -- pages 28 through 39 and then also 40 and 41, which are the A&P stores -- you will find there points per case under private label is also 24 plus in all cases, in all situations, and that is recapped, that data is recapped on page, earlier, on page 27. Although I don't have the arithmetic on my paper, on page 27, if you ad the points delivered of 102.562, divided by the number of cases, 197.59, you would also come up with 24 plus, and so, in all situations we used a cost of $.0015.

Q So did you figure that out independently for each of the A&P stores or is that an average figure?

A That is an average figure.

Q You have averaged out the experiences of the 12 A&P

stores in the store routes. Is that it?

A Yes. I think you will see, on scanning through those pages that I mentioned, all of those points per case for individual stores are all 24 plus.

Q In the case of the one store on a mixture, did that come out to the same, too, or is there some difference?

A Yes, I think that is the same. That is page 40. You will find the points per case is 24.7031.

Q All right, sir. To go back for a moment to this page 125 where you have set out the amount of the truck loading cost, I see that only wages are taken into account in that loading cost. Is that correct, sir?

A I think so. Let me see. I have to do a lot of searching through Hammond because Hammond was not so difficult in terms of principal, but the most tedious and difficult in terms of details. First, to answer your question, that is right, it is labor.

Q You did not take into account any of the machinery used in loading the trucks nor any other expenses incidental to truck loading other than just the wages. Is that correct?

A There was none I filed as such. If you will look at page 141, where there is -- where we have essentially posted all of the subaccounts from the delivery milk wholesale account in the Hammond Branch, and assume for a moment the postings and descriptions are correct -- that is all the detail we had and you cannot identify anything against the platform and loading function other than wages.

Q Some of these other expenses were more related to the loading than they were to the actual delivery of the milk on the routes, were they not, sir?

A Well, what?

Q The mechanical refrigeration, for instance -- see, there is depreciation on mechanical refrigeration, repairs to building, rents, land and buildings -- wouldn't a number of these items pertain to depreciation of buildings? Wouldn't a number of these pertain more closely to the loading function than the delivery function?

A Well, a portion of them would and then a portion of them would apply to delivery, too. For example, on the land and building -- yes, a part of the building is the storage space or cooler. However, you might call it, and the dock is part of the loading function. On the other hand, the entire office -- I wouldn't say the entire -- but the office, most of the office, part of the building -- entrance way, certainly the land, a lot of land around the buildings would be more applicable to delivery than selling, so there was no way of breaking it out; although we did not break out a portion of these other expenses against loading per se they have been included in total expenses in one way or another..

Q Mostly included in your Delivery Expenses. Isn't that

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please?

(The pending question was read by the reporter).

THE WITNESS: Well, if the Allegedly Injured Customers in O'Hare had approximately the same number of points per case for the equivalent private label items as A&P did, then the result would be approximately the same.

By Mr. Mathias:

Q Sir, returning to page 3 of Exhibit 185, the next element under your list of marketing cost elements is Physical Delivery. How was this cost element determined, sir?

Strike that for a minute. Let me go back. There is one other customer we haven't dealt with on loading cost and for the sake of keeping all of these computations together, maybe it would be easier to take that at this time.

Turning to page 10 of A&P Exhibit 185, which you compare A&P's Store No. 341 Valparaiso with Joseph Tichla & Son equivalent private label in Valparaiso, how were the truck loading costs determined in this instance, sir? I see there is a difference.

A If you will turn to the A&P Valparaiso file, which is A&PX 187, and the 5th page in that set --

Q All right.

A And on the line -- it says -- entitled -- Analysis of Item 26 Delivery Dairy Becker - Hammond =-

Q What is Item 26? Can you give me the exhibit number also mention of the fact that certain trailer runs, at least, were hauled out of Hammond.

A I think I have now acquainted myself with this. What is your question?

Q My question is, where, in your figures, which of your figures on page 126 of 185 would include -- that is Exhibit 185, would include the volume attributable to Mr. Marquardt who delivered in the Valparaiso area?

A I don't know if you can do it with the classification of volumes as prepared in the Borden documents. Unfortunately, they just don't correspond exactly to what you are I are pursuing.

Q All right, sir. Well, what figure did you use in arriving at the hauling cost for the Valparaiso stores, at least, for the A&P and [illegible] stores in Valparaiso?

A Lets see. This is something we went through yesterday. Do you want to go back over that?

Q When I asked you that question, you referred me to this page, and we never went through the calculation. We stopped at this page.

A All right.

Q That is page 126 of Exhibit 185.

A All right. Lets see. Well, I refer you to A&P Exhibit 187, Page 5, and I think these are now numbered.

Q Sir, I have that page.

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Q Would you refer us to the pages which would show it?

A Please pull out pages 23 and 24. There is one other page, pages 11 and 12. If you will keep your fingers in those pages. So we are going to refer to pages 11, 12, 23 and 24, and only in the case of Wilco Food Center will we refer to another page.

Now, page 11 shows the information that was used by Case & Company to determine the type of service. Let me please indicate a typing correction on that, on page 11. In the first group of stores, the last two names, Wallies and Wilco, there should be an X under the column entitled, Testimony of Store Operator, and also on Wilco's line, reading across towards the right, the X under "Full" is incorrect -- it should be under "Limited Service".

On the next line, the first Dalocks, the extreme right hand column where it says, Collect for Month, that figure should not be zero, it should be 4. Those are the corrections on the page.

As I said, this page indicates how we determined the type of service and the source from which we determined it. So, for the various A&P stores and complaint customers which are in the first grouping, A&P and Wilco got limited service and the other stores got full service. All of those stores received 27 deliveries per month as indicated by the next column to the right, and all of those stores did not pay cash, A We are working on time, first. We now have the information we need to calculate the delivery time to serve Burger per point, that is, we know the number of cases he took and we have a time standard per case applicable to his time of service which is full service. That time standard, as I recall, was 1.937 minutes per case.

Q That is the variable time per case taken from page 21 of Exhibit 185. Is that correct, sir?

A Yes.

Q And that is listed under the column, full service.

A Yes. We know the number of deliveries, 27 -- multiply that by 9 minutes per stop, also taken from page 21, under full service --

Q Now, you are talking about -- that is the fixed time per stop?

A Yes, that is the fixed time per stop.

Q So you are according the 9 minutes fixed time per stop for each of the 27 days which this customer was served. Is that it?

A Yes. As indicated on page 11, Burger does not pay by cash, so there is no additional time charged to him for a cash collection.

Q So, then, the total minutes -- I take it you are coming out with total minutes per month. Is that correct?

A Yes.

Q What is going to be the sum then of this variable time per case, which is the 1.947 minutes times the 78.23, plus the fixed time per stop, which is the 9 minutes, times the 27 days. Is that it?

A Yes.

JUDGE HINKES: Where do you find that 1.947?

By Mr. Mathias:

Q Page 21, sir, which is the --

A The second bottom portion of the page, Variable Time Per Case under the Full Service column.

Q Now, the fixed time per stop is also taken from the Full Service line --

JUDGE HINKES: May I see that? That is a different page, according to what is here. I appear to have a different page 21 and 22, than the rest of you.

THE WITNESS: You have 2 copies of page 22.

By Mr. Mathias:

Q Is there a copy you can hand to the Judge?

A I will let you look at mine.

JUDGE HINKES: You may continue.

THE WITNESS: I am sorry.

By Mr. Mathias:

Q So the fixed time per stop was also taken from the line entitled, Full Service. Is that correct?

A Yes. Now, go to page 23, and we have Total Minutes Per

Month, divide that by 27, to get Total Minutes Per Stop and we can also divide Total Minutes Per Month to get the Total Minutes Per Point by dividing by the Number of Points.

For example, in the case of Burger -- I will just check this out -- we have a total minutes per month of 4358.2319, and I will divide that by Points Per Month from page 24 of 53507.25, and I get $.0815 which is found on page 23 in the middle column, Minutes Per Point, so there is the Minutes Per Point which is one of the two inputs to get the Cost Per Point on page 3.

Q So you divide that into the other figure which was the Cost Per Minute, is that correct, sir, which appears on page 125, in order to arrive at the Cost Element appearing on page 3?

A No, you multiply.

Q Multiply this Total Minutes Per Point, from the middle column on page 23?

A Yes.

Q By the cost per serving minute, appearing on page 125, to obtain what you have listed on page 3 of Exhibit 185, as the Physical Delivery for Burger's Food Market of $.0370?

A Yes.

Q I believe, in connection with the O'Hare Branch and the classification of customers, we covered the point that if any of those customers took services over and above those which you listed as the Limited Service Customers, then they were classified as Full Service Customers. Is that it, sir?

A Yes.

Q In other words, if there was no rotation and the milk was just dropped off but returns were taken, that customer was classified as a Full Service Customer. Is that right, sir?

A No, I don't think I generalized like that. Would you read the question back?

(The pending question was read by the reporter).

THE WITNESS: I think he probably was. It might not have been just on that basis. It would have been -- I can't answer --

By Mr. Mathias:

Q He did take additional services over and above those which are listed in each instance -- for instance, I see, under Fixed Time Per Stop, you have a certain number of items listed -- then, you have "Add for full service". If the customer took any of these additional services, then he was a full service customer. Is that correct, sir?

A Essentially, that is right, yes.

Q The same variable time per case. You have 2 items, Customer Services and Select Merchandising Truck, which you do not have under your Limited Service -- if either of these were performed for the customer under Variable Time Standards, that customer would be a Full Service Customer. In that correct, sir?

A Yes.

Q Now, going back to your classification of A&P as a Limited Service Customer here in the Hammond Area, one of the items under A6d for Full Service, is Route Bookkeeping, yet, A&P Exhibits 94 through 100 show that the drivers on the wholesale routes in the Hammond area did make entries each and every day for deliveries to the A&P stores.

MR. FALLS: Which exhibits did you refer to?

By Mr. Mathias:

Q Exhibits 94 through 100. I have not looked at the pages — wherever A&P store stores appear therein, you will find the units delivered have been entered.

A I am not going to look through every book, but as I recall, the drivers made entries contrary to instructions.

Q This was October of 1969, was it not, sir?

A Yes.

Q So it can be assumed this was a practice in the Hammond area to make entries each day?

A It is the practice of the drivers but there has been nothing in the record to say the original conditions as set up have been changed.

Q The drivers did have route bookkeeping for the A&P stores on the Hammond routes. Is that not correct, sir?

MR. FALLS: What period?

By Mr. Mathias:

Q October of 1969?

A Yes, they entered figures as to what they delivered.

Q Sir, I see it is noon. I think this would be a good time to take the luncheon break.

JUDGE [illegible]: Very well. If this is convenient for you, we can resume then at 1:30, if that is agreeable.

MR. MATHIAS: Yes, sir.

(Whereupon, at 12:00 p.m., the hearing was recessed until 1:30 p.m., on the same day).

[redacted]

- oOo -

[redacted]

Q Now, if you--

MR. FALLS: Up above there is a list price per point.

THE WITNESS: Yes. So, for that total, actual total list prices as illustrated on page 29, we did the same there as we did for the complaint customers.

MR. MATHIAS: You figured out a list price--which came first, did you figure the list price per point and apply it to the number of points or did you take each of the products and apply i t to the list price as appearing on pages 25 and 26?

THE WITNESS: We applied the list price to each of the products.

BY MR. MATHIAS:

Q And then you divided that by the number of points delivered to arrive at a list price per point, is that it?

A. Yes.

Q And this same procedure was followed in the case of A&P in that series of exhibits similar to 29, the pages, I mean?

A. Yes.

Q O.K.

In the case of this series of documents, the pages in Exhibit 185 dealing with other than A&P customers, pages 85 through 90 in there in particular, how did you arrive at the number of equivalent cases as appears on each of these pages?

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A For each product we have the total quantity delivered, and we divided that by the appropriate number of units per case. For example, glass gallons, 4 or paper gallons 6, whatever it may be.

Q So, for the two-week period, you would list all half gallons, paper, for the whole two weeks?

A Yes, sir.

Q I see.

And consider the number of cases of that product delivered, is that right?

A Yes.

Q And then you would take all quarts of chocolate milk and total those up and consider the number of cases you had there, is that what you are saying?

A Yes.

Q And you would add these--you would accumulate the number of cases for each of the products at the end in order to determine the number of equivalent cases, is that correct?

A Yes.

Q Is this the same procedure that was followed in the case of A&P?

A Yes.

Q So, you did not consider this on a per-delivery basis to determine the number of cases being delivered per delivery?

A Right. In all situations we took the total number of unit

R9 for that two-week period, and divided by the number of units per case.

We did the same thing in the case of the Atlantic &
e4 Pacific Tea Company and the other customers.

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Q In the case of A&P, however, you have an average of all 13 stores, I take it; is that correct, sir?

A Yes, but that is a mathematical average. We didn't work that way in the case of A&P. We did the individual stores. I think if you go to the recaps of the individual A&P Stores--

Q I see.

You figured the equivalent cases for each store and had a mathematical average for the total of the 13 stores at the end?

A Yes. For example, look at pages 31 and 32, just picking two stores at random.

Q What is the page number?

A 31 and 32.

You will see the points per case are different in the case of Store 317 and in the case of Store 306.

Q And the number of equivalent cases is different as well?

A Yes.

Q Then in the overall you averaged the 13 stores together after computing out each individual figure; is that it? Sir, is that the way it was done?

A Yes.

Q Now, sir, I have one more question on this before we leave this point.

On page 11 where you have set out the type of service to the various stores --

A Excuse me. I would like to get a couple of papers back in order here.

Q All right.

Page 11, then, please?

A Yes.

Q In the right-hand side where you have the computer program constants --

A Yes.

Q -- most of this appears to be fairly understandable from the computer programming as you have turned it over to us.

However, there is one item under variable minutes per case, number of customers down in the lower half, the ones who -- from De Locks down, and there is a third number used. A K-7. You have a variable number of minutes on the computer program of 1.902 for them as compared to 1.947 for all of those marked K-6, which appear to be the full service customers and 1.053 variable minutes per case for all of the K-5's, which appear to be the limited service customers.

A Would you read those again?

Q K-5 -- if you go through the computer program constants, in the top portion from the A&P stores down through Wilco, only two numbers appear under variable minutes per case, K-5 and K-6?

A Yes.

Q K-5, looking at your computer printout is 1.058 minutes, which is your variable minutes per case according to your time standards for limited service?

A Yes.

Q K-6 on your computer printout refers to 1.947 which, according to your time standards is the variable minutes per case for full service.

Now, there is a third number appearing down below for about six of the other customers appearing below, which is K-7, and according to the computer printout you have applied the variable minutes per case you have applied to them 1.902, and I wondered if you would have any explanation for us of what element was left out of the variable time per case for those customers and why it was left out?

There is a difference of .054 minutes per case.

Looking at page 21 of Exhibit 185 which is your Bowman time standards, I find no item that listed at .045.

JUDGE HINKES: 045 appears to be the difference between limited service and full service as far as the delivered order is concerned.

THE WITNESS: Oh, thank you, sir.

JUDGE HINKES: In other words, 045 was adopted once to arrive at limited service in that particular element, but it seems as though another 045 has been deducted for some other reason.

THE WITNESS: I am not certain of the answer to that and I will have to check it but I think you have provided the clue, your Honor.

I can only guess right now that the route book indicated something which led us to the judgment that in those particular cases or in those particular situations of whatever it is, five or six stores, that there was a valid reason for making a further reduction to those particular accounts.

BY MR. MATHIAS:

Q All of these were based upon the stipulation, as I understand your coding on this sheet, and --

JUDGE HINKES: Mr. Havemeyer, I think if you add the last two items, customer services and select merchandise and truck to your limited service calculation you will get that figure of 1.902.

That is not necessarily what you did, however.

THE WITNESS: You say what?

JUDGE HINKES: At the items of 364 and 480 to your 1058 -- 1.058 --

THE WITNESS: As I mentioned, Mr. Mathias, I can't answer right now and I will have to check on it for you.

BY MR. MATHIAS:

Q Okay, sir.

Now, sir, the next item -- before we leave this one jrb 5

series of documents, pages 85 through 90 again, I would like to refer you to page 85 which is the Joseph Tittle and Son Highland Store.

A   Can you wait just a moment while I make a note on this last point?

Q   Oh, excuse me.

A   Okay.

Q   Referring to page 85, and this seems to be typical of the other pages where recapitulations of invoices were made for Borden customers, there is a first line "Price Per Equivalent Quarter," and you have "All" and on that line for Tittle Highland Food Store is .2244.

"Private Label" in the second column is .2383, and Borden label is 4925.

What is the --

A   we have not used that data.

Q   What is the meaning --

A   No.

Q   That data is not used? That calculation?

A   No.

MR. FALLS: What page is that, John?

MR. MATHIAS: Page 85.

BY MR. MATHIAS:

Q   So none of that data has been used in any of your calculations?

A No, sir.

Q Since that line was not used in any way, should it just be stricken from these various pages?

A Yes, there is no need for it; no.

Q That would be the first line entitled "Price Per Quart" on pages 84 through 90?

A Yes.

MR. STONE: Should I strike this? I have the court copy.

MR. MATHIAS: Should we strike, your Honor.

JUDGE HINKES: Sure, because there has been agreement on the record.

MR. FALLS: Which line is that?

MR. MATHIAS: The line "Price Per Equivalent Quart." It's the first line on the number of pages beginning at 84 which are entitled "Recapitulation of invoices."

MR. FALLS: Thank you.

BY MR. MATHIAS:

Q Now, sir, turning to Exhibit — correction.

Turning to page 125 of Exhibit 185 and the second half of your calculation of delivery cost —

A What page is that again?

Q 125.

A Yes.

Q You stated that the second half of that equation was your calculation of the cost per serving minute which appears on this page as $0.454 per serving minute?

A Yes.

Q Is that correct, sir?

A Yes.

Q Could you explain for us just how you calculated out this figure?

A Please refer to page 163.

Q Yes?

A .4544 is listed there, and on page 164 for the route number 2 which is a mixed store and vending route, a cost of .3135 and the rest of my discussion on this point will be pointed towards those two figures.

Q All right, sir.

A If we add up all of the standard time to serve all of the accounts on the three store routes, we have a — I am referring to line 1 now — a total of 33,126.808 route minutes.

Q Now, how is this figure, this 33,000 figure been arrived at?

A All right.

On page number 19 you will find that figure at the bottom of the page, right-hand side.

Q Yes, sir, but—

A And that figure 33,126.868 is the sum of the two figures above it.

Now, the figure of — immediately above that on page 19 which is 33,063.713, you will find taken from page 23.

The last figure on that page in the right-hand column, total minutes per month, 33,063.713 —

Q And that is —

A Total calculated minutes of all these stores.

Q That is the various customers beginning with Burger's Food Market at the top?

A Yes.

Q And down through the 12 A&P Stores at the bottom?

A That's right.

There is an adjustment there on page 19 of another 63.155 minutes, I think; and if you must know, this I would have to check on it, but I think that we discovered a minor error in some frequency of collection for non-complaint customers or on the number of stops for non-complaint customers, and added that back in.

Q Page 19?

A Page 19.

Q Could you ascertain for us just what that 83.155 figure is?

A Yes, I will.

Q That is the only difference between the total amount appearing on page 23 and the total amount of — appearing on jrb 9

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page 19; is that correct?

A Yes.

Q Now, the -- these total minutes per month are based primarily on your delivery time standards which appear on page 21 of Exhibit 185 and the cases per month which you have calculated for each of these customers; is that correct, sir?

A Yes, yes, but also fixed time.

Q Yes. Plus the 27 deliveries per month fixed time to these various customers.

A Plus collection time, yes; most of it is due to the time of handling cases.

Q So that it would be affected in large part by your calculation of the total number of cases handled for each of these customers and in very large part by the time standards which you have applied to these various customers; is that correct, sir?

A Yes.

Q Referring to -- comparing pages 19 and 23 again and looking at the subtotal for A&P Stores under the total minutes per month as it appears on page 23, which is 11,867 -- 11,867.7112, going over to page 19 you have two figures for A&P; first is 11,930.287 and then you have a second figure, minutes per month if all product in same table, which is 11,867,132.

510

That seems to correspond more closely to the figure on page 23. What is the relationship between these three figures?

A I don't remember that detail, Mr. Mathias.

Q I notice that this appears to be where your additional time per month comes in rather than in connection with collections from dealings with the other customers, because if you will subtract the 11,867 figure on page 19 from the 11,930 figure, you get this additional time per month of 63.155 which appears just below, to which you have previously referred.

Apparently this is some sort of an adjustment dealing with the A&P stores rather than with other stores; is that correct?

A Yes, so it would appear. As I say I will have to check on this, I don't remember that detail.

Q Do you know what the meaning of that statement is, minutes per month if all product in the same label?

A No, all this is tied into that figure of 63.155 which I do not remember the details on. I will have to check on them.

Q All right.

Would this indicate some inefficiency in handling two labels, possibly?

A I just don't know, Mr. Mathias.

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5452

Q All right.

In any event, sir, you arrive at a grand total of serving minutes which you carry over to page 163 of 33,126.868; is that correct, sir?

A That's right.

Q Now the next step on page 163, I see, was to compute the number of route days for those three store routes; is that correct, sir?

A That's right.

Q And that was simply three times 27 to arrive at 81 route days?

A Yes.

Q And the next step on page 163 you took was to have arrived at the serving minutes per route day by merely dividing number 1 by number 2; is that correct, sir?

A Yes.

Q And then on the store routes, you calculate there were 408.97 minutes serving time per route day?

A Yes.

Q And what is the next step, sir?

A We must refer to item 25, which is APX 86, and from now on I will refer to it by page number. Excuse me while I find it.

Q Okay.

A Please refer to page 141 and 142.

Q Okay.

A If you can --

Q All right, sir.

A The entries posted in column A and -- well, column headed "this year to date," are taken directly from AP Exhibit 86, and that will be found on page 144.

All of these figures are feint. If you check, I think you will find that the postings on page 141 and the current month column and year to date column are taken from the corresponding two columns on page 144.

Q All right, sir.

A Now, as I mentioned yesterday, I believe, 142 is sort of a right-hand extension of 141. It is a long spread sheet which we retyped into two sheets for ease in putting them into the book.

But the line headings or line captions on page 142 correspond to the line captions on 141.

So what we are doing really is working from left to right on the long spread sheet and we are then taking data either from the current month column or a -- or one-tenth of the year to date column, year to date being 10 months; and assigning that cost to vehicle cost or other non-labor or to labor, platform and ~~un~~loading; or to the fringe benefit column; or to office expense column; or to other categories under the right-hand set of columns which is entitled "all other: not applicable to AP."

Q All right.

A Now, if you will refer to page 142, you will see in the most left-hand column of data, it is entitled "vehicle cost." At the bottom of that column is a figure, $7290.39. That's the vehicle cost which appears on page 163.

Now, that figure of $7290.39 is composed of two figures immediately above it. That is, subaccount number 264 from automotive account; and subaccount 16, a freight account.

Q What was the last?

A Freight.

Q Freight?

A Yes.

Q Okay.

A Did I say 16? I mean subaccount 129, line 16 on this form. Subaccount 129, freight account.

You will find those figures posted on page 141 which in turn came from page 144.

Q And that is the $7290.39 which you have then posted on page 163; is that correct?

A Yes.

Q Not that it is a very big item, but why would you post freight, a freight cost to the vehicle account?

A You will notice the footnote -- by the way, on page 142, by the figure 33.01, that should be a single asterisk instead of a double asterisk. Then it will conform to the footnote at the bottom of page 141.

Q All right.

A This freight -- I am quoting, "Freight is amortization of freight on trucks from point of manufacture to the Hammond branch."

Q And where was that fact determined from, sir?

A When we were reviewing these accounts, we inquired about that, and we were told that that's what it represented.

Q Now, what have you done with this vehicle cost?

A Here is the vehicle cost then for the various vehicles they operate on their store routes and canteen routes. You may recall there are three store routes and three canteen routes, and one of those canteen routes is -- well, we have termed it a mixed route. So on page 163, line 5, we have 81 store route days and 81 canteen route days for a total of 162 route days.

Then on line 6, the vehicle cost per route day is line 4 divided by line 5.

Q That comes to $45 per day; is that right?

A That's right.

You also find that that figure of $45 is carried over to the next page, page 164, and is part of the determination of the cost for the mixed route. But we will get to page 164 later on, I would imagine.

Q Sir, first of all, to go back one step, where do we determine the number of canteen routes and store routes?

A Well, that's -- well, you have route books here, six route books.

Q Sir, that's -- those represent the six routes you are talking about?

A Let me just check on that.

First, each of these is labeled on the front the number December '69 -- at least it indicates what routes there are.

Q Well, your analysis of those books showed three store routes and three canteen routes, is that it?

A I think there is also something in the record some other place, I don't know where now, to show three of each.

Q Your analysis of the route books indicate that, is that right?

A I think it is more than just the route books, but I can't recall what it is.

Q All right, sir.

You determined the vehicle cost for route day of $45. Your next step is listed other non-labor from analysis of item 25.

Can you explain to us where we find that data?

A All right.

First, for identification, item 25 is AP Exhibit 86, and I will refer to it by page number.

Q That is page 144 in Exhibit 185.

A Right. Thank you.

Q All right.

A Item 25 is page 144, and its analysis is on page 141 and 142.

Q All right.

A We previously referred to it on line 4 on the vehicle cost. We have taken that from analysis of item 25. Referring to pages 141 and 142 is really what that does.

Q So now what expenses would we accumulate to arrive at this $2022 figure?

A On page 142, second column of expense data, you find a total of $2022.89. That is the figure which is posted on page 163.

The $2022.89 is the total of various postings above that. Under the general caption of delivery expense and the subcaption of other non-labor.

Q Okay.

A It includes items which are there for the purpose of operating the delivery system of a non-vehicle cost; and also non-labor, that is it does not include compensation of the routemen and it does not include vehicle cost. It includes a little for ice and supplies.

Q Sir, could you refer us to the lines on page 144 where we find these items? I see the first one is wet ice used on routes.

JUDGE HINKES: Will you hold just a moment?

(Discussion off the record.)

JUDGE HINKES: All right.

THE WITNESS: To simplify our discussion here, let me ask you to assume that the postings on page 141 in the column entitled "current month" and that one entitled "this year to date" are true postings from page 144. Otherwise, we will be going back and forth and back and forth, and get confused.

If my assumption is right, then we can keep referring to page 141 instead of going back to page 144.

By Mr. Mathias:

Q Well, there is only one problem, sir. That doesn't always work out right.

A All right.

Q For instance, the first item, wet ice used on routes --

A Yes.

Q -- on page 144 on that total, it shows nothing for the current month and nothing for that same month last year, but does show $12 year to date.

Whether that was all in one month or all in one day or what, you have apparently averaged that out over the year to $1.20 per month; is that correct?

A Yes.

If you would like to have page 144 in front of you, of course, that is your option. I think I can explain it more simply by saying that let's refer to 141 and then I will explain to you what I brought over to page 142 on a particular line or subaccount number.

But the postings on 141 are posted directly from 144.

Q Yes, sir, but there is a question -- well, okay.

A Do it your way, then, okay.

Q That just doesn't appear to be so. Take the second item. The second item is supplies.

A Yes.

Q Your listing under other non-labor is $73.37.

A Yes.

Q The supplies for the current month on page 144, which is the Borden record, is $6.24 for the month of October 1969, and in the year to date column, which is two columns over, there is a $733.37 figure which you have apparently averaged to come to the $73.37 figure. So it hasn't been a matter of lifting a figure from one to the other.

A Would you look at page 141 on that specific account, supplies?

Q Yes.

A Do you see both a figure of $6.24 in column A, and a figure of $733.74 ~~$7.33.74~~ in two columns to the right?

Q This is page 141?

A Yes.

Q Yes, I see it.

A So the postings in those two columns are directly from page 144.

Q I see.

A I was merely suggesting that we could simplify this by talking from page 141.

Q All right.

I was looking at the wrong page.

A All right.

Now, let us take or take however you choose. In the case of Wet Ice which is such a small amount anyway, there is some seasonality to it and it seemed to us that using an average figure for the month of $1.20, namely, it is used occasionally for some reason, was a more appropriate figure to use than a zero figure.

Q So, we are at the——

A O.K.

Q Yes, you have——

A In the case of the next account, "Supplies," in a particular month, it may not be representative and it seemed to us that inasmuch as we were working with the month of October and we had year-to-date figures, that a monthly average for those 10 months would be more appropriate to put in so we put in this case $73.37.

Q All right, sir.

What was the next item you have used in there as "Other Expense"?

A "Repairs to buildings."

Average $2.19 a month over a ten-month period.

We took that figure.

Q Which line is this again?

A It is line 17.

Q All right, sir.

What is the next one?

A "Repairs to Equipment" is the next one.

In that particular month of October, 1969 was slightly higher than the 10-month average but again we thought the 10-month average was more reasonable and representative and we took the 10-month average and posted $224.22.

Q Looking at page 142, it would appear that you have posted the $235 figure.

A No.

Q This is where you have accumulated this $2,023.89 figure, is it not? On page 142?

A Yes, don't you see a figure of $224.22?

Q Oh, all right, sir. I was looking at the wrong figure. I am sorry, sir.

A The next one is now on line 19, "Rent, Land and Buildings," and you notice for the month on page 141 it is $615 and for the year to date it is averaging $682.00.

It is our understanding that the Hammond Branch was being reduced in facilities at this time and in this case it seemed more appropriate that the particular month's figure would be more representative of those conditions than the year-to-date figures.

So, we took the month figure which is the lower figure in this case. That figure is $615.00. All right?

Q Yes.

A The next one is line 24, "Insurance on Fire and Boiler." It is $4.00 a month in either case whether it is the current month or year to date.

So we used $4.00.

The next line is line 25, Taxes on Real and Personal Property and in both the current month and year to date the average is $225.00 and we took that figure.

The next line, line 26, "Taxes and Permits, Other," it is $26.96 for the month and has averaged $12.10 for the 10 months and depending upon the date on which taxes or permits may be paid, it seemed the more representative figure would be the 10-month average so we used that.

In some cases, we might take the figure which is the monthly figure. It might be higher or lower than the average but we took the one which we considered to be representative of conditions.

Line 27 "Depreciation on Buildings." Now, it is $47.00 for the month, and the 10-month average is $86.

For the same reason as in the case of line 19 where we took the month figure rather than the 10-month average, we felt that was more appropriate here, also.

Q O.K.

R4

A. Line 28.

That is "Depreciation on Machines and Equipment."

For the month it is $514.00. For 10 months year to date it is $640 average.

It seemed to us for the same reason that $514.--that particular month's figure was more representative.

The same applies to depreciation on mechanical equipment, $39 was used.

Now, we come down to "Laundry," line 32.

Q Go ahead.

A. Line 32. "Laundry, "monthly figure $15.00. The average for 10 months is $9.00.

We took the monthly figure.

power

Then there is an account or line No. 33, a power, for the power charger for the month $250.81, and the average $206--am I reading it right?

We took the monthly figure of $250.81.

So, on page 142 when you add those up, it is $2,022.89 and that is what has been transferred to line 7 of page 163.

Q Sir, while we are on this subject of applying either the current month's figures shown on page 144 or the average of the year to date shown on 144, I note that to go back to the previous expense item which you had calculated on Line 4, vehicle cost, that if you take the current month of October 1969 the figure which you used was the $7,257 figure plus the additional freight allocation of $33 you mentioned above--

A Yes.

Q Whereas, if you take the year to date, you have an average per month of only $5,988.00.

A Yes.

Q There you chose to take the current month's figure, is that correct, sir?

A Yes.

Q Now, sir, having accumulated this figure of $2,022.89 for "Other Non-Labor" how have you allocated that figure, sir?

A All right.

We also divided that on 162 route days which is shown on line 8 again to get a cost per route day for this portion of the delivery cost of $12.49. That is $2,022.89 divided by 162 which is--excuse me a moment-- $12.49 shown on line 9.

So, so far we have identified two portions of this route day cost namely the vehicle cost shown on line 6 and the other non-labor non-vehicle costs shown on line 9.

Q All right.

Now, the next item, sir, bearing on 163 is the labor cost per route date and it is listed from analysis of Item 32.

A Yes.

Q Now or what is Item 32 and where do we find it?

A For identification Item 32 is A&P Exhibit 91 but from now on, I will refer to it by page number.

Q ASP Exhibit 91, did you say?

A Yes, ASP Exhibit No. 91.

Q Where do we find that in your documents?

A Let me collect my bearings for a moment here.

Q Would that be page 145, sir?

A Page 145 through page 162. I think it is really through 161 to be exact. There is a whole group of papers or pages there, referring to compensation.

MR. WALLIS: Your Honor, I note that it is 4 o'clock. Do you think we should get into this particular subject matter now?

MR. MATHIAS: Maybe it would be a good stopping place.

JUDGE HINKES: Is this a convenient point to stop?

MR. MATHIAS: It probably would be as good as any. I did not realize this particular cost element was going to involve so many pages. It would appear it is going to take more than ten or fifteen minutes to go through. So, I think it might be a good place to stop.

JUDGE HINKES: Very well. I think we ought to discuss our future plans as far as hearings are concerned. I think we can go off the record at this point.

(Off the record.)

JUDGE HINKES: We will start tomorrow morning at 10 a.m.

(Whereupon, at 4:03 p.m. the hearing was adjourned until 10 a.m., Wednesday, May 15, 1974.)

P R O C E E D I N G S

JUDGE HINKES: On the record.

You may commence, Mr. Mathias.

ROBERT G. HAVEMEYER the witness on the stand at time of recess, resumed the stand and testified further as follows:

VOIR DIRE EXAMINATION -- Continued

By Mr. Mathias:

Q Mr. Havemeyer, at the close of yesterday's session, we were discussing page 163, Respondent A&P Exhibit 185 for identification, and we were about to begin on Item No. 11 on that page -- or, correction -- Item no. 10, Labor Cost Per Route Day from analysis of Item 32, and you had noted that Item 32 was also Respondent A&P Exhibit 91, and had referred us in Exhibit 185 to pages 145 through 161 for the pages from which this analysis was drawn?

A Yes.

Q Now, sir, could you explain from that point just how you arrived at this labor cost per route day of $95.70?

JUDGE HINKES: What page is that on, please?

MR. MATHIAS: The final figure, $95.70 appears on page 163, Item 10 and the pages to which Mr. Havemeyer referred us yesterday were his calculations of this were pages 145 through 161 of Exhibit 185.

THE WITNESS: All right. On page 145, about the middl of the page, where it says, Cost Per Route Day, and that is store routes, you will see, on the right hand side, under the column entitled, Total, a figure of $95.70, which is the figure which is transferred to page 163.

So, now, we will address ourselves to the details which make up that $95.70. First, as you can see, the $95.70 was derived by dividing a figure of $7,751.58 by 81 route days. Can I have my little calculator, please?

That is the way the $95.70 was derived. Then, we go back to the two components of the $7,751.58, and that, in turn, is the sum of the two figures above it.

By Mr. Mathias:

Q Sir, those are figures including the wages and commissions for the regular route personnel, totaling the sum of $5,191.37, plus what you have termed the Route Support Personnel, which totals $2,560.21. Is that right, sir?

A Yes.

Q Going to the Regular Route Personnel, I can see that they can be identified through Exhibits 94 through 100 which are the Route Books, and which bear their names?

A Yes.

Q Now, where did you obtain their salary and commission data?

A All right. You will see a column, or 3 sets -- a set of

3 columns with a general subject over it of wages, and on that page, and opposite store route driver no. 8, there is a figure of $198.58. That is for Mr. Nowicki. For Mr. Shavey, on Route No. 5, it is $122.20, and for Mr. Murphy, it is $158.25, and that is $479.03.

Q Now, sir, I take it those figures were taken from page 146, following in Exhibit 185. Is that correct, sir?

A That is right. Page 146, there is a column entitled, Total Wages. Now, I realize it is difficult to read the names of the gentlemen, but you do see there figures of $198.58, $122.20 and $158.25.

Q Sir, on Exhibit 92, which is another copy of that same page in evidence, those names are visible, so there is no problem with respect to the names.

A All right. Thank you.

Q Then, the commissions per month were taken from the next column on page 146. Is that correct, sir?

A Yes.

O Is there any way that we can determine that those are monthly commissions from this sheet?

A I need a minute; if you will turn to the next page, which is page 147, this says, Monthly Statement of Commissions. That is the title of it and it is for the month of October 1969. Bear in mind that commissions earned in a particular month are paid in the following month. Hence, on page 146, the commissions were actually paid in the week ending November 22, 1969, as indicated at the heading of that sheet, but as you can see -- well, for example, on page 147, Mr. Nowicki is the last of the top group of 6 people. If you run your finger across to the column 21 Total Commission Paid, there is a figure of $1,012.95, which is the same figure that appears for Mr. Nowicki on page 146.

Q All right, sir. I take it if you checked out Mr. Shavey and Mr. Murphy on page 147, that that same would apply?

A That is right.

Q And that is the way you determined that was the monthly commission?

A Right.

Q In what manner did you determine the wages on a weekly basis, sir?

A Would you turn to page 146, please?

Q Yes.

A For these same gentlemen, and go back to the column entitled Total Wages. First, we do have, at the top of the page, the fact that it is the week ended November 22nd. Secondly, as you look in the two columns immediately to the left of Total Wages, you see, Total Hours, Regular and Overtime.

Q Yes, sir.

A So, obviously, and also, if you look to the series of 6 or 7 small columns to the left of that, which is headed, Days of Week, you will notice that the number of hours that they worked in the individual day columns add up to the 40 hours or the 32 hours, and in the case of Mr. Nowicki, to the 8 hours of overtime so we have here hours worked by day of week adding up to the total hours shown in the Regular and overtime columns and then the next column is the wages for those hours.

Q Sir, then, it would appear that in the case of Mr. Nowicki and Mr. Shavey, their weekly wage would have to be adjusted since one had not worked a full week that week, only worked 32 hours, compared to the normal 40 hour week, and thus his salary would be a little low -- instead of $122.20 -- and Mr. Nowicki had worked an extra day in this particular week, and thus his per week wage of $198.58 would be untypical because it accounted for a 6 day week rather than a 5 day week. Isn't that so?

A Yes, but you notice on page 145, that we are working with the total salaries of those gentlemen, so if there is some figure which is unrepresentative about it, it would only be to the extent of the overtime premium in the case of Mr. Nowicki. In other words, Shavey worked 32 hours, Nowicki worked 48 hours. By coincidence they balance each other out in terms of a 40 hour work week, but Nowicki would have some overtime premium for the 8 hours, so if there is anythink unrepresentative about it, it would only be to the extent of the overtime premium portion of the 8 hours that he worked.

Q So there is a chance then that this total per week is overstated slightly due to the overtime premium paid to Mr. Nowicki during that week. Is that correct, sir?

A Yes. First, to answer that, yes. Let me comment on it. It is also possible -- I don't know if we know this for a fact -- that some overtime may have been a routine. For example, in industry, and the dairy industry can be one of them, it is economic to pay, to have someone work overtime and pay the overtime premium up to some point where the overtime premium cost is less than the cost of an additional person working a full week, so, if some overtime was a routine, and there could be a reason for that being the normal thing, then this would be representative, but in any case, if there is anything that is not representative, it is a small amount -- only to the extent of Mr. Nowicki's premium portion of his pay for the 8 hours.

Q Now, sir, going to the next segment, the Route Support Personnel, Mr. Bogo is listed as Swing Man and Mr. Cunningham is listed as Foreman Wholesale and Mr. Shephord is listed as Assistant Foreman Wholesale. How did you obtain this information, sir?

A On page 146, the second group of names -- one is Pomeroy and one is Shepherd. That is lines 5 and 6, and just above that you will see -- I can't make out the words on my copy -- if you have the original you may be able to tell easier, but there is the words Route Foreman.

Q Sir, I see Assistant Route Foreman.

A All right.

Q That is Mr. S. Pomeroy and Mr. R. Shepherd?

A Yes. So Mr. Shephard has been identified as an Assistant Foreman. Now, we are looking for Mr. -- I will have to look at the original, Mr. Mathias.

Q All right.

A All right. I am referring to the original copy of page 145, which is A&P Exhibit 92, and I see, under a heading for a group of 2 gentleman, Cunningham being one of them, and the heading is Wholesale Foreman. You will notice, on page 145, that I have listed Mr. Cunningham as a Foreman of Wholesale.

Q According to 145, you have listed Mr. Pomeroy as Swing Man Route Support Personnel on the mixed or canteen routes, have you not, sir?

A Yes.

Q So you have not listed him as a Foreman?

A No. I referred to Cunningham.

Q Oh, excuse me. You have listed him as Foreman Wholesale at the top of the page, Route Support Personnel?

A Yes, sir. Mr. Boge, again on A&PX 92, which is the original for page 146, I find Mr. Boge listed on line 17 -- excuse me -- he is listed under a Group heading called Wholesale Route Men. Can I also look at the Route Books, please?

Q Yes, sir. There they are.

A Someone has written in the word, shop, next to his name. I --

Q Sir, those words are not in evidence.

A Oh, they are not.

Q They had been put on after the document had been taken from Borden's files. Those particular words, Shop, and Wholesale --

A To the best of my knowledge, that is not our writing. I don't know who put that on there.

Q But at the moment they are not in evidence.

MR. FALLS: What route book is that?

THE WITNESS: I am going to look through the group of them, but this is WO-7.

MR. FALLS: What page is that?

THE WITNESS: November and December 1969. All of these books are November and December 1969.

MR. FALLS: What was the page number you read a reference to there a moment ago?

THE WITNESS: I haven't read anything from it yet.

MR. MATHIAS: The reference was from page 146 of Exhibit 185.

MR. FALLS: Thank you.

THE WITNESS: Well, Bogo is not listed as Foreman or Assistant Foreman. He is listed on page 146 of the original of page 146 as Wholesale Route Man, so he is not a foreman or assistant foreman, but you will also notice, when you look at page 146, that he does not get much commission.

By Mr. Mathias:

Q So you have assumed he is a swing man, from that?

A I assume he is a swing man because of that. The regular route men are the ones that get the high commissions.

What other names are we concerned with?

Q You have already stated you took Mr. Cunningham from the Route Foreman Section above and Mr. Shepherd from the Assistant Group Foreman Section above?

A Yes.

Q I notice one other classification on page 146, and that is Contact Man. Would that be the salesman, sir?

A On the original of page 146, it looks like a Mr. Biederstadt.

Q The Contact Man would be the Salesman, would he not, sir?

A I think so.

Q So we would not be concerned with him at this particular point?

A That is right.

Q So you have taken the wages of Mr. Bogo, as the Swing Man, the wages and commissions --

A Right.

Q Mr. Cunningham, as the Foreman, and Mr. Shepherd, his wages and commissions, as the Assistant Foreman Wholesale?

A Yes.

Q And included them in as the Route Support Personnel for the Wholesale Routes. Is that correct, sir?

A Yes.

Q And taking the wages and commissions together, of all 6 of these personnel, they total $7,751.58?

A That is right.

Q And you have divided that by 81. Is that correct, sir?

A That is right, to get $95.70, and that is the figure which finally was transferred to page 163 where, along with other segments of the Route Day Cost, we intend to come up with a Total Route Day cost, and then a Cost Per Serving Minute.

Q I have one problem with your number of days, the 81 days. I realize these routes were served on a 6 day week. I take it the 81 days is based upon your analysis of the route books, is that correct, sir?

A Yes.

Q Looking at the number of days worked by these individuals, 3 drivers and the swing man, it appears, leaving off the fact that Mr. Shepherd appears to have served some routes as well, since he received a commission, it would appear that the regular route personnel and the swing man have driven a total of 92 days. Is it possible that Mr. Bogo, the swing man, was the swing man on both the regular routes and the canteen routes, and that his salary should have been split between the two?

A How have you arrived at the 92 days?

Q Page 145. If you take Mr. Nowicki, Mr. Shavey and Mr. Murphy, as working 5 days per week, which you have assumed in your calculations, that is 3 drivers, 23 days apiece, which comes to 69. Isn't that correct, sir?

A Yes.

Q If you take the swing man, and it appears again his salary is based upon a 23 day month, according to your calculation, that is an additional 23 days for a total of 92 days, rather than the 81 days which those routes were driven. I might note the man you have listed as the swing man on the canteen routes, Mr. Pomeroy is listed on page 146 as an Assistant Route Foreman rather than down among the Wholesale drivers.

A Yes.

If this becomes an important point, I will have to do a little further checking. I think we have indications in the route book as to the routes they served primarily. I can't put my finger on it going through it quickly.

Q Sir, isn't it true, if you take the 69 days for the regular route personnel in both the regular wholesale and the canteen routes, that there is a total of about 24 days unaccounted for by the regular drivers on both routes and that Mr. Fogo, the swing man, has worked 23 days -- wouldn't it be logical to assume he split his time between those 2 types of routes?

A That logic seems right.

Q Mr. Pomeroy is not listed on page 146 as a swing man, is he, sir?

A He is listed as an assistant route foreman.

Q Right, sir. In connection with that, sir, I see that you have assigned Mr. Shephard and Mr. Pomeroy as Assistant Route Foreman, either to the regular wholesale routes or to the canteen routes, whereas, page 146 does not designate which of these routes they would serve. How did you determine Mr. Shephard was the Assistant Foreman of the wholesale routes and Mr. Pomeroy was the Assistant Foreman of the Canteen Routes?

A I have segregated the set of 6 books into 2 groups, one being those which serve stores, and the other being the ones which serve canteens or, at least, predominately canteen, if not exclusively.

Q These are the route books?

A Yes, and when I look at the front of the book, just inside of the cover, you have the route salesman's name, and his address, and in some of the books, but not all, you have got the name of the foreman or assistant foreman.

Now, this one for Nowicki does not list the foreman or the assistant foreman. This one for Mr. Shavey lists Shepherd as the Assistant Foreman. This one for Mr. Murphy lists Shephord as the Assistant Foreman.

Q All right. Just so we know how you identified which routes. Wouldn't it be correct, sir, to amend page 145 to change Mr. Pomeroy's designation from Swing Man to Assistant Foreman?

A Yes, I think you are right.

Q Could we make that change on this exhibit?

A All right.

JUDGE HINKES: Very well.

THE WITNESS: Now, then, opposite his name and under the term, Route Support Personnel, opposite C-4 --

MR. MATHIAS: And Mr. S. Pomeroy in the second column entitled, Job, it should read, Assistant Foreman. Is that correct?

THE WITNESS: Yes.

By Mr. Mathias:

Q I would like to note one other error, on page 145, and that is the spelling of the name of the individual you have for foreman on Route Support Personnel. It is spelled, on page 145, as Septiniak. I believe, if you will check page 146, the original, you will find that should be spelled Szczepaniak.

All right, sir, so now you have arrived at a figure of $7,751.58 for the regular wholesale routes which you have transferred -- well, which you have converted, first, to Cost Per Route Day of $95.70, and transferred to Item 10 on page 163 of Exhibit 185. Is that correct, sir?

A Yes.

JUDGE HINKES: One moment please -- that figure of $7,751.58 is the total remuneration for, apparently, 23 days of work. Is that correct?

THE WITNESS: Well 23 days by each of these gentlemen, but remember some of them are swing men or they take over the 6th day of the route.

JUDGE HINKES: But in any event, 23 days?

THE WITNESS: Yes.

JUDGE HINKES: Why do we then divide that by a figure which involves 27 days?

THE WITNESS: Because the group called Route Support Personnel, are those who will run the route on the 6th day. The regular driver works 5 days -- it goes out 6 days, so they rotate between the routes. Mr. Boge, the swing man, for example, will work on all 3 routes, or maybe 2 of those 3 routes.

MR. MATHIAS: This is why complaint counsel questioned the total here of the $95.70 per route day in that it is Complaint Counsel's contention that some of the swing man's wages and commissions, at least, should be down within the mixed canteen routes, rather than up in the wholesale routes -- otherwise it will total 92 days on the routes rather than 81.

JUDGE HINKES: Be that as it may, lets take the support personnel you say worked 6 days a week. Their average for a 5 day week is approximately $30 each?

THE WITNESS: Yes.

JUDGE HINKES: Then, shouldn't you multiply that figure by 27, rather than 23, or did you, in the next column?

MR. MATHIAS: No, sir. I think you are mistaking his testimony. He said each of these individuals worked a 5 day week, but the routes were operated on a 6 day week basis, and the 6th day was handled by the swing man, or one of the other route support personnel. In other words, the regular route men only handled the route 5 days a week. Either the swing man or someone else had to drive the route that 6th day.

JUDGE HINKES: They all worked no more than 5 days?

MR. MATHIAS: They all worked on a basis of a 5 day week.

JUDGE HINKES: I see.

THE WITNESS: Excuse me. I would like to make a note.

MR. FALLS: Off the record.

JUDGE HINKES: Off the record.

(Off the record discussion).

JUDGE HINKES: On the record.

By Mr. Mathias:

Q Now, you have taken the figure you have computed on page 145 for these top 6 personnel, which you considered to be the personnel involved with the regular wholesale routes, and you have transferred that figure to line 10, page 163. Is that correct, sir?

A Yes.

Q What is the next step you have taken on line 11, of page 163?

A You may recall, from earlier calculations on page 141, that at the bottom of that page, opposite line 49, which is the last line, we have Fringe Benefit Percent of Applied Lab 34.11 percent. According to the data in the accounts, as displayed on page 141, we cannot associate or separate the fringe benefits of particular groups or a particular group of persons from another. In other words, the fringe benefit costs which are shown in subaccounts 48 and 49, and similarly down below in subaccounts 226, 227, 228 and 229, cannot be identified by particular persons or groups of persons, so we developed a general average fringe benefit percent which applies to everybody in this delivery account delivery milk wholesale account. That comes out to 34.11 percent, so any person who is represented or group of persons represented by the wages shown on page 41, will have following along with their wages, a fringe benefit cost which is 34.11 percent of their wages, so, since we have identified $95.70 as the wages of the persons operating the wholesale routes and the support persons operating the wholesale routes, we have brought along then, as I just explained, an additional fringe benefit cost of 34.11 percent of the wages, so $95.70, multiplied by 34.11 percent, equals a fringe benefit cost of $32.64.

Q Now, you have applied those fringe benefits to commissions as well as salaries. Is that correct, sir?

A Yes.

Q So, now, you have arrived at the figure $32.64. I see your next step in the calculation of Cost Per Serving Minute, page 163, is to take the sum total of your calculation of the vehicle cost per route day, the non labor cost per wholesale route day, the labor cost per wholesale route day and the payroll fringe cost per route day, as you have calculated each of these figures, and that figure totals, on line 12, $185.83. Is that correct?

A Yes.

Q Now, sir, I take it that you have arrived at your last figure, the cost per serving minute, store routes, by dividing that $165.00 figure, with item no. 1 above, which is your computed amount of minutes per month spent serving these 3 store routes. Is that correct?

A Not quite right. Divided by Item 3, Minutes Per Route Day.

Q And that was derived, originally, from your --

A Item 1.

Q Your Number of Minutes Per Month. Is that correct, sir?

A Yes.

Q And these Minutes Per Month or Per Route Day, were derived by applying your time standards to the various customers on those 3 wholesale routes. Is that correct, sir?

A Yes.

Q And you finally resolved in a Cost Per Serving Minute Store Routes of $.4544?

A Yes.

Q The next page, sir, in this series of computations is page 164, is it not, sir?

A Yes, it is.

Q And there you have calculated the Cost Per Serving Minute for the mixed store and vending route, route no. 2?

A Yes.

Q Now, so you have not taken into account all of the canteen routes, just that one route. Is that correct, sir?

A That is right.

Q Now, sir, going to page 164, what are the figures appearing to the right of Driver, Route No. 2. What do they represent?

A Please turn to page 145 and you will see, for Mr. Bob Warwick, wages of 727.95, and commissions of $195.40 and they equal $923.35 as shown both on page 145 and 164.

Q So that is the total of the wages and commissions of that driver. Is that correct, sir?

A Yes.

Q Now, next you list Canteen Swing Man, and you list similar wages and commissions for that individual?

A Yes, and that is Mr. Pomeroy whose wages and commissions are displayed also on page 145.

Q That is really the Assistant Foreman, is it not?

A Yes.

Q That should be changed on page 164 as well, shouldn't it, sir?

A Yes.

Q Next, you list the wages of the foreman. I take it, first of all, the $739.66 figure is the total of the wages and commissions of the Assistant Foreman. Is that correct, sir?

A Well, I see it is over, by a few cents. I don't know why.

Q But that is what it is supposed to represent, is it not?

A Yes.

Q The next figure appearing right under that, the $746.35 is the Foreman's salary for the mixed routes. Is that correct, sir?

A Yes.

Q Sir, in this case you were assigning the entire salary of the Assistant Foreman and the Foreman to one of these 3 canteen routes. Is that correct, sir?

A Yes.

Q I see. You have taken a subtotal --

A I misspoke. We then took a third.

Q The next line you then take a subtotal of the Assistant Foreman and the Foreman's wages and commissions of $1486.01, and then you have divided by that one-third, I take it, to reflect the amount of that sum that should be applied to route no. 2. Is that correct, sir?

A Yes. You have to be careful on the word -- we multiply by one-third, but that is right, one third of the cost of the Assistant Foreman and the Foreman has been assigned to this route.

Q And adding that to the driver's salary and commissions, you have arrived at a total for the 27 route days of $1,418.69. Is that correct?

A Yes.

Q If the swing man also spent some time on serving this route, some portion of his salary would have to be included in here. Is that not correct, sir?

A Yes, if he does that.

Q His salary and commissions, that is.

Sir, in calculating this total figure per route day, did you make any determination as to whether the driver on this mixed route was paid on a different basis for the 1 or 2 stores that he served than he was paid in the case of the canteens which he served?

A As I look at page 147, the second line, Mr. Warwick, I notice in column 21 that he was paid commissions of $195.40 which is the figure which I have used on my page 145, which is part of the development of this Route Day Cost for the Canteen Route. Lets work back towards the left from column 21 on page 147. That is the result of 2 figures, namely, the figure in column 18 and the figure in column 19 -- $209.35 in column 18, minus the adjustment of $13.95 in column 19, equals the total commissions paid, which is column 21. Now, to work back towards the left, further, column 14, and I see there that we have the $209.35. I think the heading there says, commission points on --

Q Wholesale Routes.

A The significant point here is that there is a figure in just the one column rather than in the 2 columns. Now, lets see -- well, I did not have that original document to work with or the one that you can read there, and I can't read the heading on those other columns, so I had no way of determining if there was any difference or any split in the commissions earned on different kinds of business on that route.

Q All right, sir. Your next step then was to divide this total compensation which you have computed, by the number of route days, 27?

A Yes.

Q To arrive at a payroll cost Per Route Day of $52.54?

A Yes.

Q Then, I take it, you have applied this same fringe benefit percentage, 34.11 percent to arrive at the fringe benefit cost?

A Yes.

Q The next item of expense appearing on 164 is Other Non-Labor Costs Per Route Day. How was that figure arrived at, sir?

A That is taken directly from page 163, line 9. There was no way of separating the other so-called other non-labor between the canteen routes and the store routes. I have used the same cost per route Day.

Q The next thing is the vehicle cost per route day, and that was done in the same manner, by taking the $45 figure from line 6 on page 163. Is that correct, sir?

A That is right.

Q Then, you have totaled these various costs that you have computed the payroll cost, fringe cost, non-labor cost and vehicle cost to come up with a Cost Per Route Day of $127.95. Is that correct, sir?

A Yes.

Q Then, you have applied Serving Minutes Per Route Day, which you state is from the analysis of store routes. Now, where was this obtained, sir? I note it is not the same figure as appears on page 163. It is off by a slight fraction. Is this just a typographical error on one of these 2 pages or was there a calculated difference?

A No, I think there was a calculated difference.

Turn to pages 19 and 20. I refer specifically to page 19, the lower left hand portion.

Q Just a moment sir while I try to locate 19.

All right, sir.

A In those 2 figures of $408.97 and $408.19, then aren't labeled, but I think, if we trace those back, that in the one case, the upper figure is the wholesale routes and the lower figure is the canteen routes.

Q Those figures would agree with those that you have used on 163 and 164.

Now, on page 164, you state that the number of Minutes Per Route Day for the mixed store and canteen routes was obtained from analysis of the store routes. Is that correct, sir?

A That is what I said, yes.

Q How did you arrive at this different figure of 33,667.713 minutes as compared to the 33,126.868 minutes between the mised routes and the store routes?

Sir, I would like to call your attention to one thing. The additional Time Per Month, which you have listed over on the right side of page 19, under the A&P stores appears to be the exact difference between the serving minutes for the store routes as compared to the serving minutes for the canteen routes. Is that correct, sir?

A Yes.

Q And --

A There is a general question on that which I have been checking.

Q You have not determined what the nature of that additional time per month is on the right hand side of --

A Not exactly.

Q It does appear, however, that is the difference between the times you have computed for these 2 different sets of routes. Is that correct, sir?

A Yes, there seems to be a difference of about 63 minutes in a month.

Q Now, in connection with your calculation of the minutes, serving minutes per month for the canteen routes, I believe you stated that these 3 routes were all canteen type of customers, with the exception of 2 stores, one A&P Store and one other. Is that correct?

A Yes.

Q How were you able to assign time to the canteen service since that would be the bulk of the time involved on these 3 routes?

MR. FALLS: Would this be a good time for our mid-morning recess?

MR. MATHIAS: All right. Maybe he could think of that while we are taking our recess.

JUDGE HINKES: Very well. We will take a short recess.

XXX (Whereupon, at 11:00 a.m., a recess was taken until 11:10 a.m.)

JUDGE HINKES: On the record.

I have been given a copy of a request by the Respondent, A&P, for permission to file a reply to complaint counsel's response in opposition to the A&P memorandum concerning time standards. I am inclined to allow this simply because it will not interfere with the progress of this case, provided, of course, that the response will be handled expeditiously. What time allowance did you have in mind, Mr. Falls?

MR. FALLS: I anticipate we can have our memorandum to you by Friday.

JUDGE HINKES: There should be no problem in that respect then and permission is therefore granted.

MR. MATHIAS: Is that Friday of this week?

MR. FALLS: Yes.

By Mr. Mathias:

Q Sir, right before the break, there was a question pending. I think the best way to proceed would be to go back and have the Court Steno read the question.

JUDGE HINKES: If you will, please.

(The pending question was read by the reporter as follows: "How were you able to assign time to the canteen service since that would be the bulk of the time involved on these 3 routes?")

THE WITNESS: We were not able to apply the standards to the specific canteen routes in as much as they are quite unique stops and, in fact, only one route had 2 store stops, one A&P and one Delocks store and our standards would not apply accurately, sufficiently accurately, on a route which is so completely of a canteen type.

By Mr. Mathias:

Q What is a canteen, first of all, before we go any further?

A Well, typically, it is a vending machine location. If you look to the route books, you will notice that is in -- I forgot the name of the company -- a steel mill and spotted around the steel mill they have got sandwich,milk and ice cream dispensers and things such as this. They will also have, perhaps, a small, quick lunch type of restaurant, cafeteria type, and these are typically called canteens.

Q Would those also include milk vending machines in gas stations and locations such as that?

A Normally it would but you will find that as you go through these books that they are,almost all stops are in a couple of steel mills.

Q So that you have just arbitrarily assigned then the same number of route minutes per month to these canteen routes as you computed for the regular wholesale routes. Is that correct, sir?

A Yes, and there was no reason for the difference in 403.19 in one case and 403.16 in the other. As you see, there is a difference of about three quarters of a minute in a day. We should have used the same figure.

Q So you have divided what you have computed to be your total cost per route day by the serving minutes per route day which you have calculated or assigned as you have stated from the store route calculation?

A Yes, sir.

Q To arrive at a cost per serving minute for route 2 of $.3135. Is that correct?

A That is right.

Q That Cost Per Serving Minute was applied to only one store in all of your calculations. Is that not correct?

A Yes. There was one A&P store on that route and one non-complaint customer.

Q And that was A&P store no. 358. The calculations for that store appear on page 20 of Exhibit 185?

A That sounds about right.

Q The main difference in your calculation of delivery cost for that A&P store, A&P No. 358, was the amount of expenditures you had calculated Per Route Minute as compared to that which you had calculated for the regular wholesale routes. Is that correct, sir?

A The way you have asked the question I may not be able to answer that yes or no.

Q Let me strike the question and start out with a new question. The principal difference in the manner in which you have calculated the delivery cost for A&P store no. 358, as compared to the other stores for which you have calculated a delivery cost in Exhibit 185, is that you have taken the serving minutes that you have calculated for this store and applied them to this different cost per route minute. Is that not true, sir?

A That is right.

Q So that the difference here is primarily the fact that this store is located on a different type of route than the other stores?

A That is right and the reason I was having difficulty answering your first question was because in your rephrasing, you said the procedure was essentially the same, it was just the difference in cost per route minute. What I was thinking of when you asked the original question was the particular volume of this particular store would also influence what it is costing us.

Q You stated, when we started this analysis of delivery costs, there were 2 principal elements involved, one was the Time Per Stop, and the other was the Cost Per Serving Minute. Is that not correct?

A Yes.

Q Now, in connection with the Time Per Stop calculation you have made that on the same basis for all of the stores you have dealt with. Is that not correct, sir?

A Yes.

Q But in the case of this one store, A&P store no. 358, you have applied that time per stop to a different cost per route minute?

A That is right.

Q And that difference is based solely on the fact that that store was located on a different type of route?

A That is right.

Q Now, sir, we have gone over your calculation of delivery cost, and the delivery cost element, as shown on pages 3 through 9, I believe, of Exhibit 185. Now, it would appear, however, that the physical delivery cost element was computed in a different manner in the case of the A&P store and the Tittle store in Valparaiso. Is that correct, sir?

A Yes.

Q Now, where would we go in Exhibit 185 to find your calculation of physical delivery cost for each of these 2 stores?

A I will refer you to another A&P Exhibit -- A&P Exhibit 187, which is the one entitled, A&P Valparaiso.

Q All right, sir. I am at Exhibit 187.

A And these pages are numbered, I hope. Turn to page 5, please.

Q Yes, sir.

A All right. Page 5 reads --Analysis of Item 26, for identification is A&P Exhibit 187.

"Delivery Dairy Broker - Hammond", and we have listed on that page the expenditures which appear on A&P Exhibit 87, for the month of October 1969. That is what you will find in the first column of data.

Q Yes.

A Now, I point out to you what we are working our way towards on this page, and that is the figure on the extreme right hand side, the second figure down, $.0168, because that is the figure which appears on the comparison of delivery costs for A&P Store No. 341, in Valparaiso and for Joseph Tittle & Son store in Valparaiso, and let me point out to you that there is not one mill difference in cost in this calculation between A&P and Tittle. They are both -- the cost to each of them is the same, but the method of arriving at that cost is shown on page 5 of A&P Exhibit 187.

Now, referring to that page, line 25 shows the total physical delivery cost of $8,547, and that should be the sum of 3 figures above that. Yes. The sum of $280, $452 and $7,815.

Q What are those 3 items? What is the $280? What does the $280 represent, sir?

A That is the net cost on rents, land and building. It is the subtotal of the 2 figures on lines 10 and 11, Rents, Land and Buildings, and a Rent Credit.

Q All right, sir. Now --

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A The next subtotal, $452 is the sum of items shown on lines 13 through 18, Taxes, Real and Personal, Depreciation on Buildings, Depreciation on Machinery and Equipment, Power Account Insurance on Fire and Boiler and Repairs to Equipment.

Q All right, sir.

A The next subtotal of -- I think it is printed out as $7,815 is a subtotal of 4 figures on lines 20 through 23 -- Delivery service charge outside haul, transfer from haul, and transfer from other points. Of course, this is the largest figure in the total of $8,547, and this is money spent on having the merchandise hauled by this dairy broker or brokers.

Q Now, sir, you have divided that by the number of points, 510,211?

A Yes.

Q To arrive at a delivery cost per point. Where did you obtain that number of points, sir?

A That is the figure we have referred to before and it is one of the A&P so-called items which is -- well, I will find it --

Q Sir, that is the same figure that appears on page 126 of Exhibit 185, is it not, sir?

A Yes, that is the page I was looking for, yes.

Q And that was an analysis of a number of different Borden documents?

A That is right.

Q To which we referred -- we referred to this analysis yesterday and had some discussion concerning the derivation of these numbers, didn't we?

A That is right.

Q You have used this same 510,211 points which appears in column 10 of line 26, under the title, Hammond Distributors, and applied that, what you have calculated out to be the physical delivery expense?

A Yes.

Q On page 5 of Exhibit 187. Is that correct, sir?

A That is right.

Q I believe you said all of these expense items were taken, as they appear on page 5 of Exhibit 187, were taken from A&P Exhibit, which is numbered 87?

A Yes.

Q Entitled, Location-Hammond-Month October 1969-Account Delivery Dairy Broker. Is that correct, sir?

A Yes.

Q Sir, now, in this case, you have just applied the delivery expense equally to every single point delivered by that dairy broker. Is that correct, sir?

A Yes.

Q If this is one dairy broker, or just whoever this particular figure applies to, you have applied it equally to all of the points that you have used?

A That is right because the broker or brokers were paid so much a point to make these deliveries and there was no distinction whether it was a delivery to an independent store, A&P store, or -- there was no distinction.

Q Well, sir, that is true of commissions as well, is it not, sir. Commissions were paid on the same basis, no matter what store delivery was made to, were they not, sir?

A You mean, in the case of Borden employees?

Q Borden route man, yes?

A Yes.

Q And yet you allocated those commissions on Borden routes in accordance with the time which you calculated it took to serve those various stores. Is that not correct?

A Yes, but this is an entirely different situation. In one case we are talking about Borden employees with Borden trucks and so forth, where the cost of making specific deliveries can be measured in terms of time as defined by contract, measured by time standards. In the other case we have purely an outside -- I don't know what the correct legal term would be -- but a non-employee anyway, operating his own vehicle.

JUDGE HINKES: The non-employee is getting paid on the basis of points delivered. Is that right?

THE WITNESS: Yes.

JUDGE HINKES: The employee is getting paid on the basis of time?

THE WITNESS: Yes.

By Mr. Mathias:

Q Mr. Havemeyer just stated commissions were paid on the basis of points delivered?

A All right. You raised the point. The commission terms are phrased that way. It has been my experience in the industry, and specifically in Chicago, and I think there was something to this effect in the Bowman Dairy Case, as expressed by a union agent --

Q Your Honor, testimony in another case, or something stated by someone else under other circumstances, would be hearsay in this matter.

JUDGE HINKES: It may be hearsay but if that is the basis for this expert's opinion, I want to hear it.

THE WITNESS: This is a very important point, that the industry and especially in Chicago, have, over a period of years, expressed the compensation package in 2 forms -- a wage and a commission. The whole intent of this compensation package is to develop a certain amount of take home pay for those drivers who work, say, roughly 40 hours a week to keep them in the dairy business so they will not go elsewhere. It takes a long time to get a dairy driver to work well, serve stores well. It is the intent of giving that man a competitive wage to keep him in the company and in the industry for roughly 40 hours a work a week as against compensation elsewhere.

By Mr. Mathias:

Q Now, sir, in the case of the delivery by the dairy, what you term, the dairy broker, first of all, you do not know, from your own knowledge, that Mr. Marquardt is included in the dairy broker category as appears on Exhibit 87. Is that not correct, sir?

A There is testimony that would indicate that.

Q What testimony of Mr. Marquardt would indicate that?

A I don't know the page reference.

Q So you cannot refer to any specific testimony of his at this moment that would indicate that?

A No. I would have to reread that testimony and point it out.

Q Sir, he was paid on a commission basis to those customers he served for Borden rather than on his own, was he not, sir?

A Yes.

Q And in the instance of the A&P store in Valparaiso, as compared to the Tittle store in Valparaiso, the Tittle store took a substantially greater volume than the A&P store in Valparaiso, did it not, sir?

A Yes. To highlight the point we were talking about the question before last, Borden didn't care if Mr. Marquardt or any other dairy broker took a lot of time to serve A&P or a little time or Tittle. There is no relationship on the payment to the amount of time required, but they certainly cared about how their own employees spent their time in serving Borden customers.

Q The next point in your calculation of the various cost elements, sir, is the branch clerical cost. How have you calculated that particular cost element?

A Please turn to page 125, and keep your -- well, we will start there and then proceed from there to other pages. The Branch Clerical Cost on page 125 is called Office Expense, is determined by taking the cost of processing a delivery ticket, which is shown on the right hand side as $3.3738 and then dividing that by the number of points in a delivery, so there are really 2 inputs to that or 3 inputs -- the office expenditures, the money itself, the numb of delivery tickets, in order to get the $3.3738 and then finally for a particular customer, the number of points he took for delivery so we must address ourselves to those 3 separate points.

The office expense will be found on page 141 and 14

Q And that is entitled, Analysis of Item 25?

A Yes.

Q And --

A Delivery Milk Wholesale.

Q And Item 25 has been identified in this exhibit as A&P Exhibit --

A 86. From now on I will refer to it by page number. So the analysis of this exhibit Item 25 is found on page 141 and 142, and on page 142, you will find a column entitled, Office Expense Total, $3,181.48 and that is the result of just one figure in that column, $3,181.48, which comes across on line 37, entitled, from office expense, and that amount of money will be found on Item 25, which is A&PX 86. It is subaccount 299.

Q What is the page number of Item No. 25, as it appears in your Exhibit 185?

A The reason I hesitate all of these times is -- my original page no.markings and references in my own set differ from the page markings we went through the other day. I always have to make a conversion from one to the other. It is page 136, and in the current month column, the last account before the words, total expense, is subaccount 299, and there is a figure of $3,181.48.

Q In this instance, you have chosen to use the current number figure as compared to an average to the year to date which would have been $2,792, would it not, sir?

A That is right.

Q All right, sir. What have you done with this figure of $3,181.48?

A I am now going to determine the number of delivery tickets and please refer to page 125 where you will find the derivation for that. I hope you can read it, where it says, Delivery Tickets. I will read it for you. One Delivery Ticket/Per Customer Delivery On Store Routes. The figure is 754, and that figure will be found on page 24 where we have a number of deliveries per month among other information.

The second column of data on page 24 is headed, Deliveries Per Month, and at the bottom of that column there is a figure of 753, and I cannot account for the reason of the posting of 754. It should be 753. The only thing I can think of is that perhaps a stipulation pointed out a different number of deliveries on one customer one day a month, and we didn't pick it up in a revision, but in any case, the figure is 753, so that is the number of deliveries to these store customers on these 3 store routes, resulting in 753 delivery tickets, and as in the case of the O'Hare analysis, which was A&P Exhibit 140, and the series after that, I believe -- is that right -- 170 and the series after that -- we have allocated the office expense on the basis of a principal office activity, which is to process delivery tickets.

The next line on page 125 reads, One Delivery Ticket/Per Customer Per Day on Canteen and Mixed Routes. Now, we will develop the number of delivery tickets for that category of business. I now refer you to page 162. All right. On page 162, we have a recapitulation -- Recapitulatio of Customers and Stops from Borden Companies Wholesale Route Books, Hammond Branch. Using the route books which appe in front of me, which are A&P Exhibit 94, which is a 2 month route book, we looked at the first 2 weeks in that period as being the period closest to October,. and now we will refer specifically to the 3 routes on the right, route no. 2 being the mixed route, route no.1 and route no. 9 being canteen routes, and we have listed there, for each of the routes, and under each of the route headings, the customer or the location and the number of stops made in that 2 week period. For example, Lever Bros., Prody Bros -- 10. That is at the location of Indiannapolis and Calumet. Then, there is a Delocks store at 1443 Indianapolis -- 11, and so on. Then, there is an A&P store, and then there are a whole lot of canteen stops in the Youngstown Steel Mill which is served by ARA, ARA being a vending or catering service. I have forgotten the name of the company, but ARA is a well known company in the catering and vending service. I think it means Automatic Retailers of America, something like that. They are large in that function. Obviously, then, they were taking care of the feeding at this mill, and so there were drop-offs so to speak, made at 13 places, but when you look in the route book, you see no extension of dollar volume for each of these dropoffs. He does post his quantity at each drop off point but there is no extension of dollars. I point that out because, on the basis of that, we believe that there is only one delivery ticket made out for that, whatever it was, 12 or 13 drop points. So, for that route, the number of delivery tickets would be 10, from Lever Bros., 11 from Delocks, 12 from A&P, and 12, being 2 week period for the various dropoff points, canteen stop points at that mill, so for that route, there would be, in the case of the 2 week period, 45 delivery tickets.

Now, I will proceed to the next route and as you go through the route book for that route, you will find something similar to this -- notice that the last stop is St. Margaret's Hospital. The last one listed here, at least. That is not part of the Inland Steel Mill, so we have 12 delivery tickets for St. Margaret's Hospital, we have 12 delivery tickets for the various canteen stops, and then there is one there, about the 4th one down, says, Hospital -- I can't make out the next word. When you look in the route book you find, I think -- it is either the hospital or the hospitality house at the steel mill, but you will find that the items taken there are quite different than the items delivered to the other stops and we assumed that there would be a separate delivery ticket made out for that. In any case, in route no. 1, we have

12 delivery tickets because there were 12 deliveries in the 2 week period for all of the canteen stops. We have 3 delivery tickets for that one indicated as hospital, and we have 12 for St. Margarets Hospital, so adding those up, you get 27. Now, on the last route, and again it is all a series of canteen stops, one location, so in a 2 week period, 12 delivery days, we assumed 12 delivery tickets. Now, add up the 45 from the first route, 27 from the second route, 12 from the third route, we have 84, and that is in a 2 week period -- multiply that by 2.25 to represent 27 delivery days, and you have 189 delivery tickets.

Q So you have arrived at a total number of tickets for the canteen and store routes of 943. Is that correct?

A Yes. When the ~~$3,18.68~~ 3,181.48 expenditure is divided by 943, you have $3.3738. That is the figure which appears over in the right hand column opposite the words "Cost Per Total Delivery Ticket.

Q Now, I see you have a different computation for A&P. Is that correct, sir?

A Yes. In the case of A&P -- do you have any questions on page 163, at the moment before I refile it?

Q Not at the moment.

A I shall have to make a slight change in the Branch Clerical Cost for A&P. Now, the method of arriving at that is shown on page 125 where we have been developing the cost per ticket. A&P has 27 invoice lines, and the private label items are 13. 13 divided by 27 is 48.1 percent. Now, following the same principal that we observed in the O'Hare study, we allocated the cost of processing a ticket to two subgroups or two groups of products on the basis of the number of line items because we -- well, I explained in a discussion, then, the principal for that, so the $3.3738 multiplied by 48.1 percent is not $.7454 which is shown there, it is $1.6228.

Q Would there have been any change in the number up above that as a result of your changing the number of delivery tickets per month from 943 to 942?

A Yes, there would be some minor change and I didn't work it through, Mr. Mathias.

It would be 3181.48 divided by 942. That would be $3.3774 instead of 3738.

Q All right, sir, now, this latter cost that you have just given to us, this cost per delivery A&P private label, how have you used that figure, sir?

A All right. We now have arrived at 2 figures, one being the cost of processing a delivery ticket for non-A&P stores and the other for the private label portion of the A&P store business. You realize that the cost per ticket was the same for both but in the A&P, we have allocated it to the private label grouping, and now we are going to divide those costs by the number of points that a particular customer took. For example, in the case of Mr. Burger, Burger's Food Market, whose results are shown on page 3, we would divide this cost per ticket of $3.3733 and in *my* discussion, I am going to stay with that cost per ticket because I did not revise it for one delivery ticket. $.3733 is divided by the number of points Mr. Burger took, and on page 24 we get that information.

Q That is the 53,507.25?

A Yes, that is what he took in a month. That is over 27 delivery days, so you divide the 53,507.25 by 27, and divide that result into the cost per ticket, and you would get, for Mr. Burger, $.0017.

Q So in calculating this cost as far as Burger is concerned, you have computed it on the basis of his entire line of purchases, not just the private label items? Not just the equivalent private label items?

A That is right, but dividing by the total number of points we have got the cost per point, whether it be private label or otherwise. He didn't actually take private label.

Q But what I am referring to is on page 3 above the 2nd column, page 3 of Exhibit 185, you entitle the various marketing cost elements for Burgers as Burger's Food Market Equivalent Private Label. In the truck loading expense you indicated that there your computation was based solely on the equivalent items, just the same number of items covered by the private label arrangement between A&P and Borden. When you got to the physical delivery cost, you indicated there that you had used the entire line of products for Burger's purchases to determine the physical delivery cost and in the case of A&P, you would only use the private label items. Apparently, in the case of the Branch Clerical cost you have done the same thing. You have used the entire line of purchases for Burgers. You have only used the private label purchases for A&P. Is that correct?

A To answer your question, yes, but I must comment on it. We had a lengthy discussion regarding physical delivery on that point. I am not going to go back over it except to say I don't agree with the way you now have characterized it because of the fact of the method I used. If you will put that qualification in there, I will answer, yes, to that part of the question.

The second part of the question, I am saying, for Burger, the Branch Clerical cost for equivalent private label item would be the same or within those 4 decimal places of the cost indicated there which was determined on the basis of all of the products.

Q Have you made a calculation based upon the number of equivalent private label points purchased by Burger during the month of October 1969 and divided it into this

$1.62.28 cent figure that you have used for the private label portion of a Borden invoice?

A No.

Q You have made no such calculation?

A Not for Burger.

Q Now, in the case of the various other customers other than the Tittle Store in Valparaiso, have you computed the clerical cost for the customers other than A&P on this same basis by dividing this $3.38 figure by the total number of points per month factor down to -- actually by the average number of points per day during that month -- is that --

A Yes.

Q And in the case of A&P, I assume that you have --

A Well, shall I explain that?

Q Yes.

A We have a $1.6228. Now, in a 2 week period, which was based upon, we have developed from, we have 12 stores on 3 routes, 12 deliveries in the 2 week period. That is 156 tickets -- I am sorry -- 12 plus 1. 12 on the 3 store routes and 1 on the mixed route -- 13 stores, 12 deliveries, 156 tickets. 156 tickets times $1.6228 gives me 253.156 for 2 weeks. The private label points delivered in the 2 week period was 108,068, and that information can be secured from pages 19 and 20.

Q So that was the total number of points delivered to all

13 A&P stores during that 2 week period?

A That is right and then the $253.156 divided by 108 -- I am sorry -- you said all points. I should have said private label points.

Q This was the total number of private label points delivered to the total stores?

A That is right, and that number of points delivered, divided into the $253 is $.0023, so I must change the Branch Clerical Cost for A&P on page 3 and subsequent pages from $.0026 to $.0023, so it is a change of 3 tenths of a mill.

Q Sir, this would seem to be a convenient time to stop for lunch, since it is now 5 after 12.

JUDGE HINKES: Very well. Lets resume in this room at 2:00.

(Whereupon, at 12:05 p.m., the hearing was recessed until 2:00 p.m., on the same day).

- oOo -

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Borden would have product waste.

Now, I will read the words to the right of that in case. They are not clear. The caption is "Full Service Points: Total Wholesale Points." And the figure to the right of that is 637,831, which you will find on page 126.

Q This is the figure you have developed for total Hammond wholesale routes in Column 13 of page 126?

A Yes.

Q All right, sir.

A Now, the next line reads, "~~List~~ Less Canteen and Mixed Route Points." It is not a number that is easily picked off and I will tell you how I got it, because, unfortunately, the categories of business as put together by Borden did not correspond to what I am looking for here.

I start off with the Hammond wholesale points, ~~367~~ 637,831. If I subtract from that the Hammond store route points, 487,683, which we will find at the bottom of page 24 in the right-hand column bottom figure, this is the total volume of those three store routes.

Q And how was this determined, sir?

A Well, points per month were determined for each of the customers, A&P customers, complaint customers and non-complaint customers.

Q Did you count up each of the points delivered to each of the customers for the entire month?

A Yes.

Q Now, didn't you take a two-week sample in order to ---.

A Oh, yes, the two-week sample which gave us dollars per point when divided into total dollars gave us points per month.

Q So, you got the dollars per point first. You counted the total dollars for a two-week period for each of these customers; is that it, sir?

A Yes.

Q Now, how was it that you obtained the number of points from that? Was there a factor you added to it?

A Well, the number of points for a particular costumer during a two-week period was determined -- and I don't remember just what page this is on but they are recapitulations of invoices and those for a two-week period were determined or the points on that were determined by knowing the total quantities of every item taken, having a point value for those items and adding up total points and total dollars.

Q So, you made a recapitulation of the points for each of these customers for a two-week period and then extended it by 2.25 to reach a monthly figure?

A Yes.

Q And you arrived at a total number of store points on these routes of 487,683.04; is that it?

A Yes. Now, when I subtract that from 637,831 I have the points on canteen routes. Remember, my Hammond wholesale routes include six routes, three of which are store routes and three which are canteen routes, so by subtracting these store route points from the total wholesale routes I now have left the canteen routes.

So, now, on page 125 ---

Q This would represent the six wholesale routes in Hammond?

A Yes.

Q Now, you have made no separate check to determine if the total number of points delivered on those six wholesale routes came out to 637,831; is that correct?

In other words, that figure was based upon your analysis on page 126, was it not?

A Yes; that is right.

Q Now, you have subtracted the canteen ---

A And mixed route, 150,148. Now, I must also subtract limited service points -- excuse me. Let me go back to this and give you the logic for it.

On these canteen stops you will find very little returns, if any, because a good route-man, especially when he is working in a plant such as we described before, the steel mill, if he sees a product isn't selling in a particular machine, he can take it over to another machine so you have very little return or product waste on canteen routes.

Q This is not personal observation of the Borden canteen routes in Hammond?

A Not those, but a personal observation of canteen routes.

So, now limited service points, I am going to subtract limited service points of the store routes. That includes then the volume of A&P, of Wilco and K-Mart, inasmuch as they were designated as getting limited service.

So, I go back to page 24 again and I now pick off on the right-hand column the subtotal for A&P stores 238,892. I picked off the K-Mart volume which is about the middle of the page, 9,067, and I pick off the Wilco points, the last one before the first subtotal, 45,862.

I add those up and they are 293,821. And that figure should be posted in place of the figure which appears on page 125. A slight change here.

Opposite the parenthetical note,"A&P, Wilco, and K-Mart," you should have 293,821.

Q Sir, when you subtracted the canteen routes, did you include in that the one Delox store that was served on that canteen route?

A Yes, but you will see on the next line I put that back in. In other words, I made the adjustment but we have not reached it yet, but when I deducted the canteen routes, I in fact deducted Delox business.

Now, the subtotal line should read the sum of the two figures above it and it is 443,969.

Now, I will ---.

MR. BAKER: What was that?

THE WITNESS: 443,969.

By Mr. Mathias:

Q And you had 343 before, so this whole number was erroneous.

A Now, I will add back in Delox from route number 2, which is a canteen route or mixed route. We did not know the specific amount taken for that Delox store. I mean for the Delox store on route number 2, the mixed route, we did not have information as to its specific volume. Having nothing else available, I used the average of the three Delox stores as appear on page 24. That averages 7,952.

Q And what is the corrected number then that should appear?

A The number which had been 335,985 is now 436,017.

Q I take it you subtract that from the 637,831. What would be your result now?

A 201,814. And so the dollar expenditure, $591.67 when divided by this number of full service points gives us a cost of .0026.

JUDGE HINKES: You mean instead of .0017?

THE WITNESS: Yes, sir.

JUDGE HINKES: That means the figure on page 3 should be changed too?

THE WITNESS: Yes, sir.

By Mr. Mathias:

Q Sir, you have then attributed $519.67 in waste product to element that you have computed in Exhibit 185 and specifically on pages 3 through 9, the next item is branch selling expense.

Strike that for a moment.

I would like to note that in the instance of both Wilco, which is represented by page 9, I believe, of Exhibit 185, and "Tittle Valparaiso," which is represented by page 10 of Exhibit 185, there was no product waste allocated to either of these customers; is that correct?

A That is right. At least that should be right. Let me check.

Q Now, in the case of pages 3 through 9, which are all of the named competitors of A&P for whom you made specific calculations other than the Tittle Valparaiso Store, you have computed out a branch selling expense of 2.3 cents per point.

Now, where would we go in your calculations to find how you derive this figure, sir?

A Please turn to page 165.

Q All right, sir. I have that page.

A You will see on that page in the lower-right-hand corner dollar value of $5,909.92, which is the same dollar expenditure as appears on page 125.

Q All right, sir, I have got these two pages in front of me.

A And eventually the dollar amount on page 125 becomes the figure of 2.3 cents. So, I showed you the relationship or the posting of the figure on 125, and now let's go back to 165 to show the development of the dollar expenditure.

Q All right, sir.

A Page 166 or page 135, whichever is clearer, they are both item 24. Either 166 or 135. In my book 135 is clearer. But both of these are printouts of what is termed item 24 for identification. That is A&P Exhibit 65. I will refer to it by page number from now on.

Q All right, sir.

A And if you look on Columns A and B on page 165, you will see that that is a copy of the numbers counting the numbers appearing on page 135, Column A being the current month and Column B being the year-to-date figure. All right?

Q All right.

A Now moving across on page 165 you notice that the next column is entitled "Average Per Month, This Year," Column B divided by 10.

Then the next column shows whether I selected the figure from Column A, the current month, or from Column B, the average year-to date figure.

Now, move across to the next column where it says "Monthly Amount," and this is where I will bring the figures across.

On the first one, "Wages Supervision," I took the dollar amount from the current month. On the "Wages Miscellaneous,"

Q You don't seem to have used either, do you, sir?

A That is right. There appears to be a error of $4.58 there.

Q I take it you meant to take the amount from the current month?

A Yes.

Q Then the sum of this would be the sum in Column A of 2,691.33 ~~269,133~~; is that correct, sir?

A Yes, a difference of $4.58.

Q And if you came over to the last column you should have the same figure, 2,691.33 ~~269,133?~~

A Yes.

Q Now, what have you done next?

A Now, on the supplies column, I judged that the year-to-date figure would be more representative and I used the year-to-date figure, that is the average monthly year-to-date figure. Whenever I say year-to-date, I mean the average month.

Now, "Legal Expense" was nothing. I can't imagine what kind of legal expense would cost only $1. Maybe the attorneys can explain.

"Travel Expense" I brought over the monthly figure of $46. "Membership Fees and Dues," I brought over the year-to-date average figure, $2, inasmuch as the membership fees or dues might be particularly high or paid in the current month, so I thought year-to-date was better.

"Contributions and Deductions," you notice that the month

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is quite high and for the same reason as membership I thought that the year-to-date would be more representative.

"Provisions For Bad Loans." Any particular month may be off. When I say off, I mean not representative, so rather than take the high figure of $5,000 I took an average figure of 3,250.

Q Sir, in connection with that item do you know whether these are specific bad loans?

A I don't specifically know. I can only guess.

Q You don't know whether these are specific bad loans or not?

A No. The use of the word there "provisions for bad loans" would make me think that it is not a specific bad loan but I don't know.

Q Specific bad loan or specific bad loans?

A Yes, loans, right.

Q Do you know whether Borden had any loans outstanding in October 1969 to any of the 17 stores other than A&P which you have noted as being served on the three store routes in Hammond?

A No. That kind of detail was not available when we did this study.

Q You do not know whether any of these specific customers had any loans outstanding from Borden at this period in time?

A No, not loans. There was credit, but not -- well, I don't know if they were loans.

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Q Now, sir, you mentioned credit. Let's go to another exhibit for a moment. The "Credit and Collection Account" for Hammond, which is A&P Exhibit 84, in which there is a provision for bad accounts of milk, that would be different than a provision for bad loans, would it not, sir?

A Yes, I would think so.

Q So this provision for bad loans would not be a credit loss or provision for credit loss, would it, sir?

A No.

Q These would be loans from Borden to some particular individual or customer?

A Yes. That is what I would assume from the name of the account.

Q For that matter, if it were strictly a credit account, Borden extended credit to A&P, did it not?

A Well, only to the end of a billing period.

Q That was generally speaking true of the other customers on these routes, was it not, sir?

A I don't think so.

Q Can you point to any specific customer among these 16 or 17 stores in the three Hammond routes who were in arrears on their payments to Borden?

A Yes, but I cannot do it with the papers I have here. I would have to go to my file.

Q Where in the record would we find this to be the case?

A I think it comes from route books but I am not sure.

Q Can you identify the particular customers for us, sir?

A Not now.

Q Do you recall who it was, sir?

A Well, I believe that Mr. Tittle was one of them who was not up to date on his payments.

Q You say this would be in the route books. You are talking about those blue route books in front of you, Exhibits 94 through 100?

A Well, if that is where I got the information, those would be the route books, but I have said a couple of times if you are going to be specific on this I can't answer with wha I have here.

Q Well, the route books do not show payments by credit customers, do they, sir?

A No, that is right.

Q So, it would have to be from some other exhibit?

A Some other sources, yes.

Q Do you recall whether this was a specific exhibit or testimony on which you base this opinion?

A Well, I don't know if it is in the record, but I think it is from a written document.

Q You do not know whether there is anything in the record to indicate that Tittle or any of these other 12 stores was i arrears on their account?

-18 A Yes. I say I don't know if it is in the record.

Q You do not know if there is anything in the record to show that?

A That is what I said.

Q All right, sir. So you have posted 3,250 in provision for bad loans?

A Yes.

Q To page 165?

A Right.

Q What is the next step?

A Well, the next three accounts represent fringe benefits. For the year-to-date they total $301.74 and there were also -- excuse me just a minute.

Well, those three accounts total $301.74 and they will be used to develop a fringe benefit expense down below, so I have not brought that across to the column.

Then we have "Miscellaneous Expense," and I use the year-to-date again, $45.77.

Now, this is an analysis of that specific exhibit, A&P Exhibit which is identified as item 24. And we will now add to the amounts I have brought over and posted into the monthly amount column some additional expenditures which I determined from the analysis of delivery costs, and that is identified in our analysis of item 25.

Q -- Where do we find that, sir?

A Pages 141 and 142 which are a two-page sheet which we have referred to several times before.

Q All right. I have those pages.

A If you put them side by side as a long spread sheet it will be helpful. You may recall that the style on which I worked with those two sheets, working with current month or average month year-to-date figures, and bringing data into various categories, previous categories that we have addressed ourselves to, having the vehicle cost, the other non-labor cost, office expense, product returns, you see there, and now we are going to look at local selling, which on page 142 is the second column from the right.

All right, the first entry there is $782.87 which is traveling expense, line 10, ~~subtract~~ subaccount 111.

Q Sir, in connection with that, your analysis on page 165 of the selling expense account shows a traveling expense on that account as well, does it not, sir?

A Yes, I think it does. Let me see. Yes. An average of $46 a month.

Q So, there is already then a traveling expense accounted to the selling expense for milk wholesale in the accounts analyzed on page 165, is there not, sir?

A Yes.

Q And this is an additional traveling expense taken from the delivery expense record of Borden for milk wholesale and Harmon that you are now applying, is it not, sir?

A That is right.

Q So, you have taken that from the delivery expense record and brought it over to your analysis of the selling expense; is that correct, sir?

A That is right.

Q All right.

A The next item brought over into this column is more membership fees and dues, $35.40.

Q Now, again, sir, in connection with that item there was already a similar item allocated on page 165 from the selling expense record of the Borden Company, was there not, sir?

A Right.

Q Now, what is the next item you have brought from page 132, sir?

A The next one is contributions and donations, $14.01.

Q Again, there was a similar expense posted on page 165 from the selling expense record of the Borden Company, was there not, sir?

A Right.

Q And this particular expenditure was taken from the delivery expense?

A Right.

Q What is the next item you have taken, sir?

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A There is a figure of $1.24, "Complementary Product," ~~subtract 11 cents~~ Subaccount 118.

Q And that is $1.24, you say, sir?

A Yes.

Q And that is taken from the delivery expense record of Borden; is that right?

A Right.

Q What is the next item, sir?

A The next item is the posting of $669.55.

Q Are you looking at the same item, sir? Oh, I see. Yes, sir. The next item you had on 142 was not brought over. I see. So, the next item you have posted from item 25 is ---

A "Miscellaneous Expense," $699.55.

Q And this is taken from the delivery expense record which is analyzed in page 142 of your Exhibit 45; is that correct, sir?

A Right.

Q And there is a similar miscellaneous expense in the selling milk wholesale record of the Borden Company which you have already posted on page 165 from the selling expense record; is that not correct, sir?

A Yes.

Q All right, sir. What have you done next?

A Well, that is all of the postings and now we accumulate them in on page 165, the extreme-right-hand column. They total $8,989.32, and then there are some transfers in and out which reduces this amount to $5,909.92.

Q Where do we get these transfers in and out, sir?

A From this item 24 shown on page 166, I think. And in that case I used the average month for year-to-date.

Q All right, sir. What what was your resulting figure?

A $5,909.92.

Q And how have you used that figure, sir?

MR. FALLS: Would this be an appropirate time for a break?

THE WITNESS: Yes, please, because I just got my papers out of order.

JUDGE HINKES: We will take a short recess now.

(Brief recess.)

JUDGE HINKES: You may continue, Mr. Mathias.

By Mr. Mathias:

Q On page 165, Mr. Havemeyer, you come up with the total figure of $5,909.92, which you have transferred to page 125 for your calculation of the branch selling expense per point. Now, can you tell us what you have done on page 125 of Exhibit 185?

A Yes. We arenow going to divide this money by store points, or the volume of points which have access to this selling function. In other words, we are going to start of with the store xxxx points and subtract the A&P points on the store

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A Yes. Just a second, please.

Please refer to A&P Exhibit 187 which is the folder entitled "A&P Valparaiso."

Q All right, sir. Page 5 of that?

A Yes. You will find the next to last figure on the right-hand side, .0094, and that is the selling cost per point which appears on page 10, the one that you originally referred me to.

Q Yes, sir.

A And now we are going to derive that which in turn is developed from two figures, the figure of $4,598, which is divided by 486,579 points to get the selling expense per non-A&P points in that area.

Q Now, sir, first, where did you get the $4,598?

A Well, the three items just above that, lines 26, 27, which is a deduction, and 28, transfer from other departments, you get a figure of $4,598.

Q What is the nature of those three items, sir?

A Travel expense, a deduction for miscellaneous expense, and transfer from other departments.

Now, the transfer from other departments ahs a footnote saying "See item 24, selling milk wholesale, line 20."

Q Where were these figures obtained in the first place, sir, before you get to item 24?

A Oh, as indicated by the title, A&P Exhibit 87, which I think is page ---

Q It would be in Exhibit 185?

A Yes, I am back to 185. Yes, back on page 137 of the Hammond booklet.

Q And this is the same document that we referred to earlier in connection with the calculation of the loading cost per point in connection with Valparaiso; is that correct, sir?

A Loading cost? Delivery cost, wasn't it?

Q The which?

A Delivery cost. Well, several things. Loading cost also.

Q I thought load was one of the things mentioned.

A That is right, loading cost and delivery cost.

Q All right, both of those costs were derived from this particular sheet by you; is that correct, sir?

A Yes.

Q Let's go back to the derivation of the $4,589 on page 137.

A What is the question?

Q Just what are the items on page 137 which you have used to derive this $4,598?

A Well, it is travel expense of $421.

Q That we find at the top of the page. That is the current month; is that correct, sir?

A Yes, subaccount 111.

Q And the average of the year-to-date on that would have been $374 approximately; isn't that correct, sir?

A Yes, and miscellaneous expense, which is a deduction which is subaccount 298, deduction of $195.

Q And that also was a current month?

A Yes.

Q And the transfer from the other departments is subaccount 30 -- I think that is 303 or 305. $4,372.

Q And that is the one you had the footnote next to on page 5 of Exhibit 187; is that correct, sir? That is the item entitled "Transfer From Other Departments"?

A Yes, but the footnote actually speaks to another item.

Q Sir, I think the footnote is correct. You are referring to item 24 for this item "Transfer From Other Departments."

A Oh, excuse me. I saw a 34 there and I couldn't find it. Oh, that is 24. It is a bad copy.

Q You are referring to page number 135, are you not, in your Exhibit 185?

A Yes, I think that is right. I read that as a 34.

Q And that is the same account that we had been discussing in connection with the branch selling expense in connection with the other customers entitled "Selling Milk Wholesale" which is Exhibit No. 85, and you are referring to the line there entitled "Transferred To Other Expense Account"; is that correct, sir?

A Yes. You can see now when you look at page 135 there is a transfer -- I don't have a line number.

Q It is line number 20, I believe.

A The footnote says line 20.

Q In any event, it is the one marked "Transferred From Other Department," $4,372.18 which you have carried over to page 5 of Exhibit 187 and that also appears on page 137, delivery dairy broker; is that correct, sir?

A 137.

Q On the heading, "Transferred From Other Department," and that again is listed on a current month on that page?

A Yes.

Q Now, the average of the year-to-date was $3,107, was it not, sir?

A Yes.

Q And that was the figure you used in the case of the other customers in Hammond; is that not correct, sir?

A No, I don't think so.

Q Turn to page 165 of Exhibit 185, the final column marked, "Developed Monthly Total Selling."

A Yes.

Q Down to the next to last line in that column on the line entitled, "Transferred To Other Expense Account," you have used the figure $3,107.72.

A Yes.

Q -- Which you took from Exhibit 85 which is also page 135 of Exhibit 135; is that correct, sir?

A Yes.

Q And these are the figures that were tamsforred to page 137 and which you are now dealing with only in this instance you have selected the higher current month figure rather than the average year-to-date figure; is that not correct, sir?

A Yes.

Q Well, sir, to go to the amount through these calculations, you have arrived at a figure of $4,598 as the selling expense under this account Delivery Dairy Broker; is that correct, sir?

A Did you say $4,598?

Q $4,598.

A Yes.

Q And that has been developed from this account Delivery Dairy Broker which appears at page 137 of your Exhibit 185?

A Yes.

Q All right, sir, now I notice that in this instance you have divided that dollar amount by what appears to be 486,579 points; is that correct, sir?

A Yes.

Q Now, I take it that is the $510,000 figure appearing above in your calculations minus the volume of the A&P store in Valparaiso; is that correct, sir?

A Yes. Not dollars, points.

Q Minus the points sold to the A&P store in Valparaiso?

A Yes.

Q Now, this analysis again depends upon your analysis on page 126 of Exhibit 185 in which you have decided that that figure contains the sales points that Valparaiso; is that correct, sir?

A Yes.

Q Now, as a result of dividing the dollar amount by the point figure that I have just mentioned you have arrived at a selling expense per point to the Joseph Tittle and Sons Store in Valparaiso of .0094; is that correct, sir?

A That is right.

Q Sir, now going back to page 3 of Exhibit 185, the next cost element which you have developed is -- and I think we have enough time to cover this before 4 o'clock -- is listed as "Average Credit Loss Per Point."

Could you tell us where we would go to find that figure, sir?

A Yes. Please turn to page 175.

Q Sir, I have that.

A We are primarily concerned with data starting around line 18 and we refer to item 22 which for identification is A&P Exhibit 83, and that is found on page number 133.

Q All right, sir.

A I am concerned with the year-to-date figures.

Q I think you did mention, sir, did you not, that page 133 was also Exhibit 83?

A Yes. Under the year-to-date section in the left-hand column which is this year, namely, 1939, we find a credit and collection cost on line 33 of $68,233.

Q All right, I have got it, sir.

A All right. Now, there will be three other items -- when I say items I mean item pages -- to which we will refer. The items 19, 20 and 21, and they should be pages 132, 131 and 130.

For example, on page 130 you will find in the same spot on that paper, namely, the year-to-date section, this year, Column line 33, the figure of 19,241.

Q This is on which page, sir?

A Page 130. That is A&P Exhibit 80.

Q Then on page 131 you will find correspondingly a figure for credit collection of 39,299.

Q This is item 21, sir?

A No, item 20, A&P Exhibit 81, page 131.

Q All right, sir.

A And finally on item 21, which is A&P Exhibit 82, and page 132 you find a figure of 9,693. Those three figures which I have read off pages 130 through 132 will add up to the amount of money which we took off page 133, and 133 has as previously demonstrated, and this demonstrates again, is the sum of the costs of those three subcategories.

Now, we are not concerned with milk distributor in this case, because I am talking about the Hammond Branch exclusive of Valparaiso, so I am not concerned with the $39,299. Not at this time. That is the milk distributor. I am not concerned with the trailer runs because that is another area. I am concerned with the ~~$1,942~~ $19,241 which is charged against "Milk Regular," and so I brought this over to the milk regular column, the third column from the right.

Q All right, sir.

A And then down on line 27, since that represents a 10-month figure I have taken one-tenth of this to get ~~a year-to-date~~ an average per month figure of $1,942 -- excuse me just a moment, please.

Q There seems to be some error here.

A Why do you say that, Mr. Mathias?

Q How do you derive this $1,942 under milk regular?

A It is one-tenth of ---

Q Oh, I see it.

A As you know, credit and collection cost in that month could be unusually high or low, so we have gone through these discussions of this nature before and I believe that the year-to-date figure would be representative. $1,942.

Q All right, sir.

A Now, I have allocated that between milk retail and milk wholesale on a 12 percent and 88 percent basis.

Q Where have you calculated this basis, sir? How have you calculated out the percentage figures which you appear

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to assign 12 percent of this credit and collection expense to retail, and 88 percent to wholesale?

A You may recall from looking at page 126 that we have various categories of business. There is strictly retail, wholesale ~~and~~ on retail, there is wholesale ~~and~~ on wholesale, and so forth, and what I am trying to do is to associate -- what will I say -- the amount of credit and collection money with kinds of business. Let me see if I can be more specific.

Q Which figures have you used here to arrive at your ratio?

A Well, it is not a specific set of numbers here and I am going to have to describe the judgment behind it.

You notice on page 126 strictly retail is about, oh -- in Column 3 on page 126 there is total retail of 321,000. Roughly half of that is wholesale and so what is identified as strictly retail in Column 1, 161,000 is about -- well, let me calculate it. About 25 or 24 percent.

I didn't calculate this exactly, of the amount shown in Column 13, Hammond wholesale routes. In other words, 161,000 divided by the 637,000 is in the neighborhood of 24 percent.

Q All right, sir.

A Now, strictly on a statistical basis I would say, well, 24 percent of the credit and collection cost ought to be charged against retail and the remainder against wholesale, but both based upon a number of this record as well as my observations form the dairy business, I believe that would not be appropriate.

For example, if you look at the credit and collection cost per point ---

Q What page are you referring to?

A Page 131.

Q Now, sir, this on 131 refers to Hammond distributors?

A Yes.

Q What does that have to do with retail or wholesale?

A Well, I will try to tie it in. Notice the cost per point there is .007. I refer you to Hammond distributers because this route is serving wholesale customers. There is no retail on it.

Now, when you go to, however, page 133 ---

Q One moment. How do you know that Hammond distributor is selling wholesale accounts? Just what kind of accounts is he selling to?

A Wholesale, not retail. Retail means home delivery.

Q Couldn't it be bulk wholesale?

A Yes.

Q It could be quite a variety of business other than just strictly wholesale to stores, could it not, sir?

A Yes.

Q It could be canteen?

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they not, sir?

A Yes, I think that is right.

Q Now, isn't it safe to assume that the retail routes number among their customers in the hundreds at the very least?

A I would think so.

Q And yet in your judgement the credit and collection expense of dealing with those hundreds of customers would bring down the average of the credit and collection expense of dealing with those other 17 customers. That is your judgement, sir?

A Oh, you know the credit and collection should say the collection function in retail and delivery ---

Q Could you answer my question first and then give your explanation, sir?

A All right. May I hear the question again?

(The pending question was read by the reporter.)

THE WITNESS: Yes. First. That is the answer. The collection function on retail is done by the route-man. He is the one who contacts the customer when he or she is slow on payment. The collection function or the credit function on wholesale is not done by the route-man and so your out-of-pocket credit and collection cost on retail is miniscule.

By Mr. Mathias:

Q If there is a difficult customer to collect from, the route-man cannot handle that, can he sir, on a retail route?

A He may or may not.

and collection expense in this instance is .002 dollars per unit; isn't that correct, sir?

A Yes.

Q And now it is your judgment that that would be increased due to a disproportionate expense of collection on the wholesale accounts as compared to the retail accounts. That is your judgment, is it not, sir?

A Yes.

Q Now, you are not aware of what expense elements or what departments are included in the expense by Borden under the credit and collection expense on page 130, are you, sir?

A No, I am limited to the information at hand.

Q Do you know whether that would include a pervision for bad debt, sir?

A I am not sure.

Q Sir, I would like to refer you to A&P Exhibit 84, which is entitled, "Location Hammond, Month, October 1959, Account Credit and Collection," and the total for the month under that account which has been described by Mr. Daube as including retail and wholesale as well as transport milk is about $3,000 for the month of October 1959; is that not correct, sir?

A Yes.

Q Sir, isn't it true that almost that entire amount is due to interest on overdue accounts and provisions for bad accounts?

A I can't read it on my copy but are you talking about subaccount 133?

Q 133 is listed as provision bad accounts milk distribution and it is $6,000 and right above that in account 125 is interest overdue account, $911.54. The two together total $6,911.54 which when coupled with a lower entry entitled "Transfer From Other Points," which we obviously can't identify, totals the entire amount for that credit and collection account of $7,903.

Now, wouldn't it appear from this analysis, sir, that the credit and collection account of Borden was primarily concerned with bad debts, bad accounts?

A Would you give me the title again of subaccount 133?

Q 133, well it is "Provision Bad Accounts" I take it it is milk distributor -- I am sorry, $6,000.

What I am primarily pointing out, Mr. Havemeyer, is that the various subaccounts listed on this credit and collection account all appear to be related to bad accounts, do they not, sir? There is legal expense provision, bad accounts milk provision, bad accounts ice cream, interest on overdue accounts, provision bad accounts, milk distributor, and miscellaneous expense which appears to be zero for the current month and it totals only $30 for the whole year-to-date.

A Yes.

Q So, would it not appear that the credit and collection expense of Borden was primarily the result of bad accounts?

A Well, yes. I would agree with that from the very beginning.

Q Now, any bad accounts among the retail customers of A&P would appear among those expenses, would they not, sir?

A Now, what do you mean by bad accounts?

Q An account that has not paid.

A Well, this is not a -- no, no, no. This is an operating expense account. This is not the amount of accounts receivable.

Q We know that. It is an expense account. The figure you have been referring to before is an expense item, too, is it not, sir.

A That is right, yes.

Q All right, sir. Now, my question is wouldn't any bad accounts among your retail home delivery customers, any customers who hadn't paid their bills, be listed as bad accounts with the Borden Company?

A Yes, and as you notice -- yes, first, to answer your question -- that of that total amount that you referred me to of 7,000, 000 of it is interest on overdue accounts, not $6,000.

Q That is true, sir, but there aren't current month entries for bad accounts either on milk, are there, sir?

A No, not in that particular month. These are year-to-date.

MR. MATHIAS: This is page 10 now of Exhibit 188 sir.

Sir, in accordance with your instructions Complaint Counsel did get together with Mr. Havemeyer and A&P's counsel over the phone and reviewed the procedures followed in this documentation, so I will try to use leading questions wherever I can.

- -

ROBERT G. HAVEMEYER the witness on the stand at time of recess, resumed the stand and testified further as follows:

VOIR DIRE (Resumed)

By Mr. Mathias:

Q Now in that regard in connection with the marketing cost element entitled "Credit and Collection" on page 10, Exhibit 185, the calculation for that particular figure under the Joseph Tittle and Son column is found on page 175 of Exhibit 185, is it not, sir?

A Yes it is.

Q Turning to page 175 I see that first of all in the column marked "~~Two~~To-milk Distributor," which I understand from your previous testimony is the column on page 175 which pertains in your opinion to the Valparaiso area -- is that correct, sir?

A Yes, sir.

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Q Now I see a credit and collection expense in that column of $39,299, is that correct, sir?

A Yes.

Q Now that in turn was taken from page 131 of Exhibit 185, was it not, sir?

A Yes, it was.

Q And that particular page of Exhibit 185 is also A&P Exhibit 81, is it not, sir?

A Yes.

Q And that figure, $39,299 is taken from the line entitled "Credit and Collection, year to date", is that correct?

A Right.

Q Then down below in the next line you have computed on an average per month of $3,930.

A Right.

Q Now sir, I take it that the series of computations down below beginning with the 510,211 and ending with the .0031 is your calculation ofthe credit and collection expense -- this is on page 175 -- is the calculation of the credit and collection expense which appears on page 10 of Exhibit 185, is that correct sir?

A Yes, it is.

Q And the 510,211 figure is again taken from page 131 at the top, which is the sales volume for the month of October in the ledger sheet or the Borden record entitled

"Two-milk distributor", is that correct, sir?

A Yes.

Q Now, sir, I see figures here that you have subtracted, certain figures representing the A&P points. I take it those are the A&P points for the Valparaiso store, is that correct sir?

A That is right.

Q As I understand it those figures should be corrected. Whereas they now read 23,632, they should read 22,778.

JUDGE HINKES: 22,788?

THE WITNESS: Yes.

By Mr. Mathias:

Q And those are again in points, is that correct sir?

A Yes.

Q And after subtracting those points you arrived at a total number of points of 487,423, is that correct, sir?

A That is correct.

Q And you have then divided that number into the $3,930 to arrive at what you term the credit cost risk per points of .0081, is that correct, sir?

A That is correct. That slight change in the number of points does not change the final figure on line 38. It stays at .0081.

Q Now, sir, do you know from your own knowledge that this credit and collection expense is not that of Borden collecting

Q Turning now back to page 3 of Exhibit 185, which is the comparison of Burger's and A&P, I see the next cost element set out here is entitled "Borden Label Advertising Expense" and it is my understanding that the calculations for that particular element can be found on pages 125 and 169 of Exhibit 185, is that correct, sir?

A Yes, I think that is right. Yes.

Q Now, sir, going to page 125 first, I see that you have a total expenditure for this element of 800 -- it looks like $876, is that correct sir?

A That is right.

Q And you have divided that by a total of 618,610 points?

A That is right.

Q To arrive at a figure of .0014.

Now I understand that there has been some correction in these figures and that should now be .0015, is that correct?

A That is right.

Q And that number should be carried over to pages 3 through 9 should that not, sir?

A Yes.

JUDGE HINKES: Let me follow you there now.

My page 125 is not too legible. Which figures are you changing there now?

THE WITNESS: The extreme right-hand figure at the edge of the page, although very faint, reads .0014 and it should read 0015.

JUDGE HINKES: That is the figure for merchandizing?

THE WITNESS: No. Advertising. It is the second figure from the bottom.

JUDGE HINKES: I don't even have that on my sheet.

THE WITNESS: It says "Advertising/Borden."

JUDGE HINKES: And the figure is?

THE WITNESS: .0015.

By Mr. Mathias:

Q Now that had incorrectly been transferred to pages 3 through 9 to begin with, had it not sir?

A Yes.

Q So where .0033 appears on pages 3 through 9 of Exhibit 135 on the line "Borden Label Advertising Expense," this should be changed to .0015, is that correct?

A Yes, sir.

Q Now sir, the figure $876 which you have attributed to this account has been calculated on page 169, is that not correct, sir?

A Yes.

Q Now, sir, going to page 169 and the extreme left-hand column, you have a column entitled "Metro Chicago area, twelve months '69", and there are certain figures appearing down below in that column under the heading "Borden media expenditures", and listing yogurt, Thirstee-Smash Lite Line Milk and dips and you have on each of these lines certain figures.

Now these appear to be taken from page 171 of Exhibit 185, is that correct sir?

A That is correct.

Q Which is entitled "1969 Chicago expenditures, Chicago, Rockford, South Bend", and has in handwriting at the top "Media only."

Now, I see that with the exception that you have eliminated the Rockford and South Bend expenditures shown on this page you have transferred the figures appearing on page 171 to this first column on page 169, is that correct, sir?

A Yes it is.

Q Then you have computed in the second column a total population figure for Illinois and Indiana.

Now what sections of Illinois and Indiana are you referring to?

A This is the Chicago Met area which is a standard met statistical area usually termed SMSA, and that is the population in Illinois and Indiana SMSA.

Q That would be the SCA, would it not, sir, standard consolidated area? Is the SMSA excluded Indiana and the

SCA, which is the standard consolidated area includes Lake and Porter County of Indiana.

So this figure appearing under that total column -- I take it that is in the thousands, is it not sir?

A Yes, 6,979,000. Yes.

Q Then in the next column you have headed "Lake County, Indiana, area. I take it that is the area which includes Gary and Hammond, is that correct, sir?

A Yes.

Q You have calculated the population of that county which is 546,000 according to this as a percentage of the Chicago SCA population, is that correct sir?

A Yes.

Q And you come up 7.82 percent?

A That is right.

Q And based on this you have apportioned the expenditures appearing on page 171 minus the Rockford and South Bend expenditures on the basis of 7.82 percent of those expenditures being applicable in your opinion to Lake County, is that correct, sir?

A Yes, sir.

Q And you have further broken that down on the line below $745 average per month, is that correct, sir?

A Yes.

Q Now, sir, in the next column entitled estimated production expense at the rate of 19 percent you included in an additional figure of $142.

Can you explain that for us sir?

A Yes. Production expense is the cost that the advertiser would incur in preparing materials which, or having someone prepare the materials which would be used for the advertising medium or which would be displayed through the advertising medium.

Q Now, sir, your original media advertising expenses were taken from this page 171 of Exhibit 185 were they not, sir?

A Yes.

Q That also has an A&P exhibit number does it not sir? What is that for the record?

A I am at a bit of a loss this morning.

Q One moment. I believe I can find it in a hurry.

A I think it is item 29.

Q That would be A&P Exhibit 90. It is part of A&P Exhibit 90. It is the third page of that exhibit.

Now sir, this page that document, page 171 of Exhibit 185 is in itself a summary page, is it not, sir?

A Yes.

Q In other words, this is not a billing from the various media, is it sir?

A Well, no, it's not a billing. It's a summary of the billings.

Q Now sir, it is a summary in any event, is it not sir?

A Yes.

Q It does not appear to be a regular ledger sheet or regular document of Borden such as the various ledger sheets we have been discussing, does it, sir?

A That is right.

Q Now sir, do you know from your own knowledge that the Borden employee who made this summary document did not include the cost of producing copy in his expenditures listed here?

A Well, I don't know what he knew but he knew that it was for media only.

Q Yes, sir. This is the advertising expenditures but do you know from your own knowledge that he did not include the cost of producing the copy that was used in this advertising?

A Well, the words "Media only," would say that. I mean, that is the meaning of that word in the advertising field.

Q That was not written on it at the time the document was typed, was it sir?

A No.

Q And that was written on in handwriting afterwards, was it not?

A Yes.

Q Do you know who put that on?

A No.

Q Or why it was put on?

A Oh, I can -- well --

Q Outside of assumption do you know from your own personal knowledge why it was put on?

A Well if you call it an assumption but it is to indicate what is reported to be on that page.

Q Well newspaper and television advertising are considered to be media advertising, are they not, sir?

A Yes.

Q And those are the only types of advertising mentioned in this particular document, are they not, sir?

A Right.

JUDGE HINKES: But it is your testimony that whoever wrote the words media only, meant to convey the understanding that this did not include the preparation of copy, is that it?

THE WITNESS: That is right. Because this is a term which is used in the advertising function.

JUDGE HINKES: But you don't know whether that person was using that term in that way do you?

THE WITNESS: Well, --

JUDGE HINKES: It may have been, e.g., the office boy newly hired.

THE WITNESS: It could have been, yes. Theoretically it could have been.

By Mr. Mathias:

Q And it may have been only to distinguish this particular summary document from some other type of advertising expenditure such as directory advertising, yellow page advertising that sort of thing.

A Well I would doubt that.

Q But you do not know from your own knowledge that that is not the case, is that correct, sir?

MR. FALLS: I think the witness has indicated what he knows and I would object to the question.

JUDGE HINKES: I think we can go on, Mr. Mathias.

By Mr. Mathias:

Q All right sir, the next column on page 169 is listed as total cost per month and here you have added your estimated production expense to the advertising expense taken from page 171 to arrive at a figure of $867, is that correct, sir?

A Yes.

Q Now the next column on page 169 is entitled "Directory and Miscellaneous Advertising for Item 29, Line 9, and I don't -- what's the next?

A Oh, total year-to-date.

Q Total-year-to date/ten or divided by 10 I think.

A Yes.

Q And that we would find, sir, --

A Page 170.

Q 170 would we not sir?

A Yes.

Q And that has also been introduced in evidence as A&P Exhibit 90, is that correct, sir?

Well I have it in front of me so I will just make a statement on the record that it has been.

A All right.

Q Now I note looking at page 170, this account being entitled, "Hammond October 1969 Account Advertising Milk", that you have taken from the year-to-date column 2 items entitled "Directory Advertising and Newspaper and Magazine," which are $43.05 and ~~$43.15~~ $42.15 respectively for the year to date, and total $85.20.

You have taken this figure and rounded it off to a $9 per month expenditure for these two categories of advertising, is that correct, sir?

A That is right.

Q And you have then added that to your previous total cost per month to arrive at your calculated total advertising per month for the Hammond market of $378, is that correct sir?

A Yes.

Q And that is the figure then which you take over to

A Correct.

Q Now, sir, before we leave page 169 assuming for the moment that your calculation is necessary to estimate production expenses, you have used a rate of 19 percent. Now, where did you obtain this percentage figure?

A General experience. That would be quite low for television. It would be a little high for newspaper. But we think of that as a conservative figure and used 19 percent.

Q So this is an estimate. Is it based on any records?

A Not in this case no.

Q Is it based on some records?

A Well our general experience in working in the marketing field.

Q Hasthat experience been reduced to writing, sir?

A No. Because it varies from -- well it just varies.

Q Does it vary from area to area?

A Well, yes, it can vary from area to area. Oh, excuse me. Wait a minute.

On production expense. Well, it will not vary by area as much as it will by the format of the advertising, whether it be television or newspaper.

Q Would it vary in accordance with the type of presentation say on television as to whether or not it was a few seconds spot or a long advertisement on prime time? Would this cause a variation?

A Yes. If that is an error it is an error on the low side.

Q This is your opinion.

A Yes.

Q And this entire 19 percent figure is just a judgment figure arrived at by yourself, is that it?

A Well not just by myself. Drawing upon the firm's general experience. I don't mean I asked everybody in the Case & Co. but it is not just my experience.

Q To your knowledge this general experience has never been reduced to writing. No writing is to support this.

A Yes the figure of 19 percent I don't think has been reduced to writing but figures which correspond to the 19 percent I am sure have been reduced to writing.

Q But you did not consult them in arriving at this 19 percent.

A I think I consulted people rather than documents.

Q So this was sort of consensus of judgment then among you and your conferees at Case & Co.?

A Yes.

Q Now, sir, I was going to return to page 125 but I see you have made the same calculation of the advertising expenditure per point on page 169, have you not sir?

A The question doesn't have any meaning to me, Mr. Mathias.

Q Well let's go back to 125.

A All right.

Q You have taken the $876 and you are applying that to 618,610 points, is that correct, sir?

A Yes, although by telephone the other day we changed those figures.

Q Well what are those figures now, sir?

A The 681,610 should be 586,745.

Q And what other changes are made then in the figures above it?

A The figure immediately above it 340,744 should read 372,609.

The figure to the left of that which now reads 97591 should be 129,456. Those are the changes.

Q So what you have done here, sir, is take the sales on the Hammond routes wholesale and retail according to your calculations and subtracted out the A&P sales and the sales to the Canteen, is that correct, sir?

A Yes, the A&P private label sales.

Q Yes. That is the 243,153 figure, is that right?

A Yes.

Q And the vending machine or canteen sales is represented by the 129,456 points, is that correct, sir?

A Yes.

Q Now, those points sold through the vending machines are Borden label products are they not, sir?

A Yes.

Q Now you have subtracted those two items which the A&P private label points and the vending machine points which total 372,609 from the ~~fixture~~ figure you represent to be the total sales on wholesale and retail routes in the Hammond area to arrive at the 586,745 figure, is that correct, sir?

A Yes. I would like to modify your last sentence. It is the sales on those routes which would be sensitive to advertising. That is why the word sensitive is there. In other words, the volume sold to the canteen vending machines.

Once that arrangement has been made with ARA or whoever the company might be of that nature, that is the commercial nature of that type of business is very much a price basis assuming adequate service by the supplier, and so once that arrangement has been made and the Borden label products are put in the canteen vending machines the people at that location who put their money in the vending machine.

They buy what is in that vending machinery so those points are not sensitive to advertising.

Q Of course once a store selects Borden as its sole supplier and takes a Borden label, if a customer chooses to deal with that store he has no choice but to buy Borden label milk, is that correct?

A Yes, but there is a difference here. Once you are in a large factory, such as we indicated with ARA down in the steel mills, while theoretically it is possible for the worker in the steel mill to go outside the workers' yard, I think you have appreciation of how big that steel mill will be, to go to some other store to buy some other label, it is not likely that he is going to do that.

On the other hand, the housewife, if by chance she doesn't care for Borden label, can go to the next block to buy another label product at another store or, as is frequently the case, the stores which carry two labels, Borden and other, to pick up the other label.

So there is much more freedom of choice to the housewife who is shopping as compared to the steel worker going to a vending machine.

Q But the milk in the vending machine served by Borden is Borden label milk, is that correct sir?

A Yes.

Q Generally speaking there is a label on milk in a vending machine, is there not sir?

A Yes.

Q Whether it be Borden or whoever else might be serving it, there is a label?

A Yes.

Q So after arriving at this 586,745 figure, you have divided that into the [illegible]76 to arrive at the .0015, is that correct sir?

A Yes.

Q And I take it that the change in this total number of points from 600-some-thousand down to 586,000 is the difference between the original .0014 and the figure you now use of .0015, is that correct, sir?

A Yes.

MR. MATHIAS: Maybe this would be an appropriate time for a break sir.

JUDGE HINKES: Yes, let's take afew minutes now.

(Brief Recess was Taken.)

JUDGE HINKES: You may continue, Mr. Mathias.

By Mr. Mathias:

Q Mr. Havemeyer, now turning to page 10 of Exhibit 185, I see that in the case of the Tittle store in Valparaiso you have made a separate calculation of the Borden label advertising expense and in this case I believe that that calculation was made on page 169, is that correct, sir?

A Yes it is.

Q And turning to page 169 I see that you have listed this calculation under Porter County, Indiana, is that correct, sir?

A Yes.

Q And I take it Valparaiso is in Porter County?

2966

A Yes.

Q And you have taken the total population of Porter County 87,000 and computed that to be 1.25 percent of the Chicago SCA, is that correct sir?

A Yes.

Q And in that manner you have arrived at an annual expenditure for Porter County of $1428?

A Yes.

Q And taking one-tenth of that representing the month of October, you have arrived at the $119 figure, is that correct sir?

A Yes.

Q And in the next column you have again applied your 19 percent figure for estimated production expense and added that to the $119, is that correct, sir?

A Yes.

Q And you come up with a total cost per month of $142?

A Yes.

Q Up to that point?

A Yes.

Q Now in the next column in Porter County you have listed the directory and miscellaneous advertising for item 29, you have listed $135.

In this case you have an asterisck stating "See item 20, line 32". Now, item 20 is page 131 of Exhibit 185, is it not sir?

A Yes, I think it is also page 178 just behind us.

Q Referring to either 171 or 178 we would find what you have referred to in this footnote as item 20, and that particular document has also been introduced in evidence in this matter as A&P Exhibit 81, is that not correct, sir?

A Yes.

Q Now, I see on the year-to-date portion of page 131, the lower half, on the line entitled "Advertising," there is a figure of $1,348. Is this the source of the $135 appearing in this next-to-last column?

A Yes, it is.

Q Now, sir, do you know from your own knowledge that this $1348 figure appearing on page 131 is not Bordens own allocation of the media advertising to this particular account?

A I would doubt that.

Q On what basis, sir?

A That media advertising was -- excuse me just a minute.

On page 171 was $118,000 and as you had noted before, that page 171 was not a part or did not appear as a regular accounting record.

Furthermore, media advertising is much more likely in almost -- well, I am quite sure it would be placed at a national headquarters such as our dairy division headquarters, be it at Columbus or New York, and in addition you will notice that at least they have in some of these other accounting statements, like page 170 and others, in the case of Hammond specified directory or local advertising or local newspaper and magazine advertising.

So these are two or three reasons for saying that that would not bewhat you would question.

Q Well sir, wasn't it a question of a practice of Borden to charge off their national and regional advertising to various accounts during the course of the year and then any funds that were left over at the end of the year to charge them back to those accounts as a credit?

A Charged back as a credit.

Q Isn't there usually in the Borden Accounting Records a credit return to the various accounts in the month of December on the advertising account?

A In saying that you would have to be specific as to time. By time I mean year because as I think you recall from earlier discussions, not just in this exhibit but in general discussion the Bordon Company changed its accounting system from '65 to '66 to '69, so there were at least those changes. So when you question me about that and if we get into detail on it I may have to refer to other records, but in general I would say you hwould have to be more specific as to the year you refer to herein you talk about that point.

Q Do you know from your own knowledge whether or not the advertising expenditures appearing on the various accounts including that which appears on page 131 and also the other Hammond accounts entitled milk regular, trailer runs, and total milk, are not allocations to these various accounts in connection with national and regional media advertising?

A Well, let me give you another reference which I think may help clear this up.

Q Do you know from your own knowledge the answer to that particular question first?

A I think so by this next reference.

Q What is the reference sir?

A Just a minute please.

Turn to page 172 which has as its general heading, total milk Chicago region, December 1969, so this is 12 months and on the year-to-date section which is the lower half on line 32 where it says advertising, you find $25,884.

Now that is about one-fifth of the amount shown on page 171 as the media advertising and page 171 clearly states that this is media advertising for Chicago-Rockford and South Bend which is generally the Chicago region.

So you have got $118,000,118,723 identified on page 171 as 1969 Chicago expenditures, Chicago, Rockford and South

Bend, and you come over to page 172 which says total milk Chicago region, and you have only $25,884 for advertising, so the Chicago media advertising is not in that $25,000.

Q That depends sir, on what area is covered by page 172 would that not be true, sir?

A Yes, but it does say Chicago region. It doesn't just say an individual branch, and earlier general discussion on the question of areas I think would identify the Chicago region as being beyond just the Chicago limits.

Q Referring to page 170, sir, which is a record for the Hammond region for October 1969 entitled "Advertising, Milk" there is a total figure appearing on that sheet of approximately $7,367, is that not correct, sir?

A Yes.

MR. FALLS: What page?

MR. MATHIAS: Page 170.

By Mr. Mathias:

Q And if you go to the page entitled "Total milk", the accounting record which has been introduced in evidence as Exhibit 83, which appears at page 133 of Exhibit 185, that same number appears on the advertising expenditures does it not sir?

A The $7,378 yes that appears there.

Q And on page 170 where this account is analyzed only $85.20 involves what can be termed local advertising, is that not correct sir?

A Right.

Q And the bulk of that account is marked transfer from suspense and transfer from other points, is that not correct, sir?

A Yes.

Q So that apparently the bulk of that expenditure of $7,867 is something other than local directory and newspaper advertising is that not correct, sir?

A Yes. I was unable to identify the specifics of those transfers to suspense transfers from suspense and transfers from other points on page 170.

I was tempted to include that data which would have raised the cost even more but I could not identify it and I did not use it.

Q Yet you have included it in the Valparaiso area in the Porter County area.

A Well, just the local directory advertising.

Q Where have you included the local directory advertising? You have taken the total amount which has been transferred from page 170 to page 131 which is 1$1,348. That would correspond to the total advertising expenditure shown on page 133 of $7,867. That is a portion of that expenditure.

A Yes.

Q So that that goes beyond the directory and newspaper and magazine advertising and is primarily involved with this amount that has been transferred from suspense and from other points, is that not correct, sir?

A Yes, but then if I had done that I should have had to do that in the case of non Valparaiso area, the Lake County, Indiana, area.

Q What I am saying, sir, is that this 135 is not directory and local advertising expenditures.

A That is right.

Q And you do not know from your own knowledge just what that figure does represent do you sir?

A No, I do not.

Q So this in any event, sir, after having combined the total for media advertising of the original amount you apportioned to Porter County plus the 19 percent in arriving at a subtotal of $142 you have added this $135 figure to arrive at a total expenditure of $272, is that correct, sir?

A Yes.

Q And then below on page 169 you have taken the point volume shown for dairy distributor accounts on page --

A 131 I believe.

Q -- 131 of 510,211 and subtracted out the volume for the A&P Valparaiso private label, is that correct, sir?

A Yes.

Q And arrived at a total number of points which you termed to be advertising sensitive points of 488,269, is that correct, sir?

A Yes.

Q And I take it you have divided $272 by that figure to arrive at what you have termed the Borden label advertising expense of .0006, is that correct, sir?

A Yes. Excuse me. I am not certain that the copy that the Judge has in front of him reflects that minor change. We talked about it on the telephone.

On page ~~129~~ 169 sir where there is a figure of 23,100 ~~operats the Board~~ opposite the A&P Valparaiso private label that has been changed to 21,942.

And the following figure of 487,111 should be 488269. It has no effect on the final answer.

JUDGE HINKES: Thank you.

By Mr. Mathias:

Q Now, sir, I note one other change you made on the total media advertising in the lower half of this page you originally had a number of 118,723. This has been changed to $114,258 has it not, sir?

A Oh, that is right. That was strictly a mistype. In the calculations which follow on the lower half of the page the correct figure of 114,258 was used.

Q Now sir, in connection with this volume A&P Valparaiso private label 21,942, I note by an asterisk that you have placed next to this number this includes more of the Valparaiso A&P store does it not, sir?

A No, it does not. The reason --

Q What is the meaning of the footnote?

A The 21,942 is two and a half times the two week volume of this one store. The note means that there was indication from other sources that there were three A&P stores in Porter County.

We did not have volume information on those other stores but if we had subtracted instead of 21,942 if we had subtracted three times 2,942 the figure of 488,269 would become 444,385 and we would still end up with .0006.

Q Well, Mr. Marquardt only served one A&P store in Porter County, did he not sir?

A Yes.

Q And do you know from your own knowledge whether or not the other stores in Porter County were served by Borden routes or by vendors?

A Well I think the answer to that is somewhat unimportant since we are talking about advertising.

Q Well you are allocating them to a certain number of points. If they were not included within those points to begin with, they could hardly be subtracted, could they, sir?

A Oh; I see your point.

Q Assuming for the moment that the A&P Valparaiso points were included in here -- and Complaint Counsel might have some argument with you on that -- if these other two stores in Porter County were not served by vendor, well they couldn't possibly be in that figure, is that right, sir?

A You are right.

Q So you arrived then at a figure of .0006 which you have transferred to page 10 of Exhibit 185 under the Joe Tittle and Son store, is that correct, sir?

A Yes.

Q Now, returning to page 3 of Exhibit 185 I see the next item under your marketing cost elements is entitled "Borden Label Merchandising Expense."

A Excuse me just a minute. I would like to get my papers straight.

Yes, sir.

Q And according to my information we would go to pages 125 and 142 to find your calculations of that item, is that not correct, sir?

A Yes.

Q And this is in Exhibit 185?

A Yes.

Q Now, sir, looking at page 125, first I see a line entitled "merchandising" and then (Equipment and service", and under the column entitled "Normal amount, October 1969" you have an expenditure of what appears to be $788.34, is that correct, sir?

A Yes.

Q And I take it that that is derived from page 142, is that correct, sir?

A Yes.

Q And now, going to page 142 the last column thereon is entitled merchandising support, and shows two figures: The first is $43.73 and the second is --

A Seventy-nine cents.

Q Seventy-nine cents?

A Yes.

Q And the second is $744.55, is that correct, sir?

A Yes.

Q And these total the $788.34 which you have transferred to page 125.

A Yes.

Q Now, sir, these two figures the ~~43 cent~~ $43.79 figure and the $744 figure, that was taken from page 144 those two figures were taken from 144 of Exhibit 185 were they not sir?

A Yes.

Q And that page has also been introduced into evidence as A&P Exhibit 86, is that correct, sir?

A Yes.

Q And entitled location Hammond, month October 1969, account delivery milk wholesale, is that correct, sir?

A I cannot read the title, okay I accept it.

Q Well that is the way it is on page 86.

A I accept it.

Q Now, this $43.79 figure, where do we find it on page 144 sir and what does it represent?

A Well first it's an average of a 10 month figure of $437.94 for sub-account 122 repairs to caninets.

And on page 144 you will find under the column this year to date on sub-account 122 the figure of$437.94.

Q And that line is as you stated entitled, "Repairs-Cabinets."

A Yes.

Q Now the next item $744.55 sir, that is also taken from page 144, is it not, sir?

A Yes.

Q Now sir, in the clearer copy in the record Exhibit A&P 862 entitled "Rent, Leased Cab and Comp. Is it not, sir?

A Yes. Leased cabinet and compressor.

Q Now, sir, you have applied both of these figures as merchandizing expenses in dealing with the various customers whose names appear in pages 3 through 9 of A&P proposed Exhibit 185, is that not correct sir?

A Yes.

Q Now sir, in the case of this 744 figure, that appears done uniformly even in those cases because the same procedure was used. It is just that the final number for Mr. Pergler as compared to Wilco Feeds might be a little different because the number of points per case or points per delivery would be different but uniform.

Q But in the case of product waste branch selling expense Borden label advertising, Borden label merchandising expense, the volume purchased by each of the individual customers has not played any part in your calculation; is that not correct, sir?

A That is right.

Q Now, sir, in the case of the Tittle Varparaiso store I note on page 10 that there was no merchandising expense calculated for that account; is that correct, sir?

A That is right.

Q Now, sir, it would appear that of the various marketing cost element costs we have discussed up to this point the A&P stores were only charged with costs in the case of three elements, truck loading, physical delivery and branch clerical cost; is that correct, sir?

A That is right.

Q Now, in the case of each of these elements under the A&P private label the costs computed there are for the private label only; is that not correct, sir?

A Yes.

#3-4

Q And in each case the cost which you have computed there are average costs for the 13 A&P stores on these two routes; is that not correct, sir?

A Yes, three routes.

Q Three routes. That would be on pages 3 through 9 of Exhibit 185?

A Right.

Q Now, sir, I see that the next step in your calculation is the summing of each of the cost elements above, and in the case of A&P on the one hand and the other customers on the other hand, to arrive at a subtotal of marketing cost elements for each; is that correct, sir?

A Yes.

Q Again, in the case of A&P this would represent an average cost of serving the 13 stores; is that correct, sir?

A Yes.

Q Now, the next step on page ---

JUDGE HINKES: What should those figures be in view of the revisions? The subtotals?

THE WITNESS: We have not reprinted this out with all those corrections, sir, but we will do that.

JUDGE HINKES: I see. Very well.

By Mr. Mathias:

Q So, in the case of A&P subtotal and the subtotal of the other customers on pages 3 through 9 at least there will be changes in that subtotal; is that correct?

A Yes. We are in the process of doing that.

Q Now, returning to page 3 for the moment, which is the calculation for Burger's Food Market and A&P, the next step you have taken is to calculate out a percentage for general selling and administrative expense of 5.33 percent.

I understand that these calculations can be found on pages 125 and 173 of Exhibit 185; is that correct, sir?

A Yes.

Q Sir, going to page ~~152~~ 125 first, you merely have a notation, distribute administration and HO overhead -- I take it that is home office, is it, sir?

A Yes.

Q And then in the amount of $3,740, and then a notation percent of all other marketing costs, and over in the extreme right-hand corner at the bottom is the figure 5.33 percent; is that correct, sir?

A Right.

Q Now, the calculation of that, I take it, was made on page 173?

A Yes.

Q Turning to page 173 you have included in this calculation the number of items on a year-to-date basis. These figures appear to be primarily taken from page 174; is that correct, sir?

ms-6

A Yes.

Q Which has also been introduced in evidence in this matter as A&P Exhibit 80?

A Yes.

Q Now, the first item of expense you have listed is advertising and that is taken from line 32 on page 174; is that not correct, sir?

A Yes.

Q And that is the $6,519.

The next item of expense is taken from line 33 of the same, page which is entitled "Credit and Collection," and the year-to-date figure is $19,241.

A Yes.

Q And if we go down through selling and delivery the figures appearing on page 173 appear on page 174 at lines 34 and 35; is that correct, sir?

A Correct.

Q Then you have taken a subtotal of this amount in the amount of $892,724; is that correct, sir?

A Yes.

Q Now, all of these expenditures that you have listed, advertising credit and collection, selling and delivery, from page 174 apply to both retail and wholesale routes; is this not correct, sir?

A Yes.

Q Now, the next item of expenditure which you have included is advertising per item 29 medium only 10/12ths.

Now, I take it that this is the same calculation of media advertising that you made previously on page 169; is that correct, sir?

A Yes.

Q So that the $8,935 that appears here is the same that appears in column, in the fourth column, the upper half of page 169, that is under Lake County, Indiana area?

A Right.

Q Total distributed on population?

A Right.

Q And you have taken 10/12ths of that representing the year-to-date and you have calculated that to be $7,446; is that correct, sir?

A Yes.

Q Then you have added on again your estimated production expense of 19 percent; is that correct, sir?

A Correct.

Q And this is in keeping with the same logic as your calculations on page 169, is that correct, sir, as to the applicability of the 19 percent?

A Yes.

Q And you have calculated that to be $1,415 and arrived at another subtotal of $8,867; is that correct, sir?

A Correct.

Q And you have added that sum to the subtotal above to arrive at what you termed total marketing expense except district administration and overhead home office, and that total is $701,591?

A Yes.

Q Then going back to page 174 you have taken two figures from lines 40 and 43 of that page which you have entitled "District Administrative Expense and Overhead Expense Home Office," is that correct, sir?

A Correct.

Q And those total on page 173 $37,000-and-some which you have then divided by the 701,000 figure to arrive at a percentage of 5.33 percent; is that correct, sir?

A That is correct.

THE WITNESS: Your Honor, let me suggest a change in the Judge's copy. There is a mistype at the bottom of this page. This figure should be 701,591. The calculation is correct. It is just a mistype on the number.

By Mr. Mathias:

Q All right, sir, then going back to pages 3 through 9, you have used this 5.33 percent to determine the general selling and administrative expense for ASP for each of these other customers involved on those pages by taking 5.33 percent of the subtotal of expenses on each of these columns; is that correct, sir?

A Yes.

Q Now, this will again have to be changed on pages 3 through 9 to reflect changes in the above figures; is that not correct, sir?

A Yes.

Q Now, in the case of Valparaiso you arrived at a different percentage figure, that is in the case of page 10 of Exhibit 185; is that not correct, sir?

A Correct.

MR. MATHIAS: Your Honor, I see it is now noon. Maybe we should take our luncheon break now.

JUDGE HINKES: Very well. We can do that. Can we return at 1:30?

MR. FALLS: Can we make it 15 minutes later than that, Your Honor?

JUDGE HINKES: Sure. 1:45, we will resume at that time.

(Whereupon, at 12 Noon, the hearing was recessed, to reconvene at 1:45 p.m., the same day.)

AFTERNOON SESSION

1:45 p.m.

JUDGE HINKES: If you are ready we can now go on the record, Mr. Mathias.

MR. MATHIAS: I am now prepared to go forward, Your Honor.

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ROBERT G. HAVEMEYER, the witness on the stand at time of recess, resumed the stand and testified further as follows:

VOIR DIRE (continued)

By Mr. Mathias:

Q Mr. Havemeyer, at the close of this morning's session we had discussed the manner in which you had computed the general overhead and district administrative expense for the customers in the Hammond area, for A&P stores and for those stores named in pages 3 through 9 of Exhibit 185, and we were about to begin determining how you had arrived at a similar calculation for the Valparaiso stores, the A&P and Tittle store in Valparaiso.

Now, I note that on page 10 of Exhibit 185 that you have calculated the percentage to be used in this instance to be 6.93 percent and I understand that you made the calculations underlying this figure on page 177 of Exhibit 185 and that the data you used is that appearing primarily on page 131, the particular dollar figures you have used in page 177; is that correct, sir?

A Yes. I think you will find it also on page 178.

Q In other words, 131 and 178 are the same?

A Yes, they should be.

Q 178 is almost unreadable. That is why I didn't use it. That 131 and 178 also correspond, do they not, sir, to A&P Exhibit 81?

A Yes.

Q Now, looking at page 177 where you make your calculation I see you have two columns: First of all, "Year-to-Date," and "Average per Month", that appear in a calculation of your percentage figure, you have only used the year-to-date figure; is that correct, sir?

A Yes.

Q So concentrating on that column, the first volume is sales volume Chicago metropolitan area, media advertising and production expense.

No, I see you have got two things running together here, don't I? The first item is sales volume and that is taken from page 178, the top line, sales volume year-to-date; is that correct, sir?

A Yes, it is.

Q 5,582,511 points?

A Yes. As a matter of fact, though, that number is not used in any of the calculations below.

Q The next item appearing is the Chicago metropolitan area media advertising and production expense. Now, this is as was previously calculated on another page we have referred to.

A 169.

Q -- 169, and in that regard you have merely taken the year-to-date figure which is $1,428, you have taken 10/12ths of that plus 19 percent which you calculate to be the estimated production expense and arrived at the total figure of $1,416; is that correct, sir?

A Yes.

Q In other words, this should be approximately 10 times the amount appearing in column "Total cost per Month" on page 169 in the calculation of what you would term dairy broker Valparaiso in the third column of those calculations; is that correct, sir?

A Yes. The 10 is coincidental. The 10 happens to come up because it is 10/12ths of 1.19.

Q Correct.

Now, the next item that you have included is "Advertising" and that has been taken from line 32 on page 178 of Exhibit 185; is that correct, sir?

A That is right.

Q The next line "Credit and Collection" is also taken from page 178, line 33; is that correct, sir?

A Yes.

Q And the final figure appearing on this calculation is "Delivery," and that is taken from line 35 on page 178; is that correct, sir?

A Yes.

Q Now, I note that there seems to be one major difference between your calculation here and your calculation for the Hammond customers on page 173 where there was another element included, and that was selling, and looking at page 178 it would appear that that has been omitted in this case because there is no selling expense listed to that account on either a monthly or year-to-date basis on that page; is that correct, sir?

A That is correct.

Q So that you have added these four items, the media advertising, the advertising, the credit and collection and delivery to arrive at a subtotal of 218,537; is that correct, sir?

A Yes.

Q And except for the media advertising all of those figures were taken directly from page 178?

A Right.

Q Now, you have then taken from page 178 the figure shown on lines 40 and 43 of that page which are entitled, "District

14

Administrative Expense" and "Overhead, Home Office," and they total $19,512.

A Yes.

Q Which you have divided by the total expenses you calculated above to arrive at the 8.93 percent figure; is that correct, sir?

A Yes.

Q And you have then taken this over to page 10 in Exhibit 185 and used it to calculate what you determined to be the general overhead and district administrative expense by multiplying the total of all of the expense elements above by this 8.93 percent in each column; is that correct, sir?

A Yes. Before we leave page 177, perhaps we should read into the record a minor change that we had on the telephone the other day.

Q All right.

A On the line where the 8.93 percent appears, $19,512 is divided by 218,537. Again that was a mistype. The correct figure was actually used in the calculation. 218,537.

Q Now, sir, you have added your computed general overhead and district administrative expense to the previous subtotal to arrive at what you have termed "Total Marketing Cost" in each instance on pages 3 through 10 of Exhibit 185; is that correct, sir?

A Yes.

ms-29 to the question of admissibility in some way.

There are also some supplementary exhibits which perhaps should be considered at the same time as the ones already offered.

What we have done, I had indicated in my redirect, remember, with respect to the first two sets of exhibits, the profitability study and the O'Hare route study, that we had some investigations in process or some exhibits in process which I was not able to go ahead with at the time I did my redirect on those other exhibits.

What I would like to do now insofar as possible is to pick up all of those threads so that we can now complete the redirect on all of these series of exhibits. That is what I would like to go ahead with, if it is all right with you.

JUDGE HINKES: Very well.

MR. FALLS: I say some of these things relate to the earlier sets of exhibits. Some of them cut across the whole series of exhibits.

So, we will try to do it in as orderly a way as we can but there may be some jumping around.

XXXXX

REDIRECT EXAMINATION (resumed)

By Mr. Falls:

Q First of all, let me ask you, Mr. Havemeyer, whether since last week you have made some further investigations of the files of Case & Company to see whether anything else could be found relating to the time standard information, that is, any other documentation relating to the time standard information reflected in A&P Exhibit 153?

A Yes. Last Wednesday we had a need to find some papers and we took that opportunity then to go through every single sheet in our file and in the course of that, although we were not looking for it, but in the course of that we uncovered a few additional sheets of information which relate to the subject of time standards.

MR. FALLS: I would like to mark the next A&P Exhibit 197, a document consisting of six sheets. They are all stapled together. The first sheet is titled, "Store Delivery Standards for Elston Based on 1949 Time Studies."

MR. MATHIAS: I wonder, Your Honor, if the document can be marked with the letter pages? We are having a very great deal of trouble with our documents and the rules require that all exhibits be paginated with the number of exhibit plus a letter, so I believe it would be helpful if we started proceeding in that manner.

JUDGE HINKES: We will mark the cover page, which is a table and we will call that 197-A.

The second page that I have here, I am not sure that I can read the first word of the capiton. Is it "Iceton"?

THE WITNESS: Elston.

JUDGE HINKES: "Elston Division Delivery Standards."

ms-31 That will be B.

The third page is just a partial page and it is numbered 2. That will be C.

The fourth page is a handwritten document entitled, "1949 Time Study Observations Position in 1949." That will be D.

The fifth page, a page a tabulations entitled, "Division Elston, 1949 Route Studies." Page one of two is E, and page 2 is F.

(The documents referred to were marked Respondent A&P Exhibits 197-A through F inclusive, for identification.)

XXXXXX

By Mr. Falls:

Q Mr. Havemeyer, you have a copy of 197-A through F. Could you indicate what that consists of and explain sheet by sheet what it covers?

A Yes. First of all, these papers do relate to the subject of the time studies which were developed in 1949. I had mentioned in earlier testimony upon questioning by Mr. Mathias in regard to -- I don't know the exhibit number. It is about an eight-page exhibit of time standards.

MR. FALLS: A&P Exhibit 153?

THE WITNESS: Yes. In regard to A&P Exhibit 153. I had mentioned that this had been prepared from something which was already in the file when I started working at Bowman Dairy as an employee of Stevens, Jordan and Harrison, and one of my projects was concerned with the utilization of the time standards and, to repeat, I had mentioned that I did not develop the table of standards. I may have rearranged it and I may have put a title on it, but the standards had been in the file when I arrived on the scene.

A&P Exhibit 197-A is the handwritten, or is at least a handwritten listing of those standards which had been in the file when I arrived, when I started working at Bowman Dairy in regard to these standards.

This handwriting I recognize as being Mr. Waterhouse's writing and Mr. Waterhouse is a gentleman I mentioned as being a consultant on site for the development of the standards.

By Mr. Falls:

Q Mr. Waterhouse was employed by whom?

A By Stevens, Jordan and Harrison, and he was a consultant and as far as I knew directed the project. When I say directed, I mean directed the details.

Q Is Mr. Waterhouse now dead?

A He is now dead, yes. And here is a list of the standards in his handwriting and these are the standards which now appear in A&P Exhibit 153. The second page was also in file when I arrived at Bowman, which is now A&P Exhibit 197-B, and it appears to be a draft typing of a grouping of standards whereby they have been grouped by those which relate to the time per customer or time per stop, which is in the upper

ms-33

portion of the page, and then a separate grouping of those standards which relate to the time necessary to handle a case or cases of merchandise.

That goes on to the second page of that, which is A&P Exhibit 197-C. So A&P Exhibit 197-A through C are listings and groupings of the individual, as we call them, elemental time standards, and these are the standards which we have ultimately used in our calculation of delivery time and cost in the various major A&P exhibits which we have submitted.

Page 197-D is in my handwriting. It is something I wrote back in 1955 or '56. At least at the time that I was working in this project. And at that time I had wanted to know the positions of the various people, the Bowman employees who actually took the time studies, because as I mentioned in the case of the Borden-Bowman trial, I was intimately involved in working with Mr. Waterhouse's work sheets because I had to show them to an explain them to Mr. -- well, the economist for the Justice Department, which had brought suit against Borden and Bowman.

So for my purposes I had listed the names of the people who took the time studies and their position in 1949 so that as this economist and I would review a detailed time study or work sheet by a Bowman employee, they could refer to this page now identified as 197-D, and say, Oh, yes, this was done by Mr. Miller and Mr. Miller was a route foreman in Elston in

1949.

The word "Elston" is not in my handwriting. My handwritin the word "Forest" had been corrected to "Elston," but most of the words on here with a couple of exceptions are in my handwriting.

As we go on to 197-E and 197-F, we have a listing of time studies which were made, the study number indicated in the first column, the route number which was studied in the second column, and the date of the study in the third column.

As indicated on 197-E there were 24 studies with most of these studies taken in December 1948, January and February 1949. This is not in my handwriting. I do not know whose handwriting it is.

And there is a note at the bottom saying, "These studies were not used in the standards."

Page 197-F again is not in my handwriting except for the insertion of the individual's names. Those are the names that appear on page 197-D, and again it shows the route which was studied in the first column, the study number and the date c the study.

With about maybe four or five exceptions, all of these studies were made in July and August 1949. There were 56 such studies as noted there, and a further note says that these studies were used for the development of standards.

I believe the study number coding is related to persons. For example, Mr. Peterson, I think will find all of the studies made by him have a five as the first digit, and Mr. Leonard No. 6 as the first digit, so this was a way of identifying the study by person, so with 612, you knew automatically, the first digit being 6 that Mr. Leonard had done it.

So here to my knowledge is all the information that is available in our files. That is some additional information from what I had before concerning the development of the delivery standards for the Elston division in 1949.

Q And now to turn to A&P Exhibit 197-A, the first page of A&P Exhibit 153, I believe it is true that the order in which some of those numbers appear is a little bit different and some of the captions are a little bit different.

For example on A&P Exhibit 153 it says "Get order" and "Delay to get order," whereas in A&P Exhibit 197-A it says, "Sell" and Delayed sell."

Have you checked the numbers appearing on those two sheets?

A Yes, I have, and the numbers agree.

Q There is one column I believe, however, that appears on 197-A that does not appear on A&P Exhibit 153, and that is the column titled "Number of Studies."

A Yes, that is right.

considerable discussion that as the data in the original Attachment V-D was based upon 14 A&P stores, and these were stores which were selected in a certain way described in earlier testimony on three routes, and they were stores for which the route salesmen had, contrary to instructions, posted information in the route books -- although I must say I am glad they did because at least it gave us some details which we otherwise would not have had.

Now, in the back-up work sheets which have been given to complaint counsel for Attachment V-D, we have shown through work sheet format, written work sheets, how the data was derived, and I refer to these sheets, and we have also put in the first column the data which now represents all of the A&P stores for which we had any data in O'Hare.

In other words, while we felt that 14 stores were a good and representative sample of A&P, we only had 19 to draw on, so rather than perhaps have an argument about whether 14 or 19 was more appropriate, the data in this first column now represents the data based upon all the A&P stores for which data was available in the O'Hare area.

Shall I go through a description of these work sheets?

MR. FALLS: I don't think it is necessary.

MR. MATHIAS: May I ask one question?

Did you basically follow the same procedure you outlined in connection with the original section V-D, only

JUDGE HINKES: Off the record.

(Off the record discussion).

JUDGE HINKES: On the record.

By Mr. Falls:

Q We are now in A&P Exhibit 170, about half way back in the book. The sheet I want to refer to is a sheet entitled Information Used By Case & Company to Determine Type of Service and Appropriate Wholesale Delivery Item Standards, Bordens O'Hare Branch, Wholesale Route Customers, March 1966. It is about 2/3rds of the way back in the book and comes right after the couple of sheets that set out the Case & Company Delivery Time Standards.

JUDGE HINKES: That is Attachment VIII.

MR. FALLS: It looks like this.

MR. MATHIAS: I have it now.

By Mr. Falls:

Q Referring to that exhibit, Mr. Havemeyer, which has to do with the classification of these customers as to the type of service they receive, would you explain, in a little more detail than I think was done on either direct or cross, just how those customers were classified, and on the basis of what information?

A First, the form itself indicates, by X marks in the appropriate column, the source document or information which was used by us in determining the type of service, and then if you move towards the right, under a column entitled, Type of Service Described, you find X marks under the column, Limited, or the column headed Full Service. The left hand columns indicate from whence we got our information and the column I just mentioned, headed Full Service or Limited Service, indicates our conclusion. In the case of the A&P stores, the contract which is shown in CX-62 indicated the form of Limited Service that was to be provided, no special deliveries, essentially a drop type of service, and various other conditions which we classified as Limited Service.

Now, no such single source document was available for the decision as to the type of service rendered to the complaint customers, so we will go down the list, starting with Mayfair Foods.

Now, there was testimony of a store operator for Mayfair Foods, and as we analyzed that testimony, we found that the merchandise was delivered to the dairy case, right to the dairy case. We found that the Borden driver checked the date of a stock -- that meant he had to look at the merchandise that was remaining and find out if the remaining stock there was still within the so-called code date and if it was out of code, he removed the out-dated merchandise and there were even occasions when the drivers would rotate the stock in the dairy case. By that we mean he would bring forward to the front of the case the merchandise which was still within the code date, but closest to falling outside of the code date — in other words, to try to make certain that merchandise does not become out of date by the next delivery, and Borden took back the outdated merchandise. That was part of their risk or cost of doing business with Mayfair Foods.

We also found that on occasion there were special deliveries made to Mayfair Foods so we have the driver who is handling merchandise, going to the dairy case, rotating the stock, inspecting the stock to see if it is within code. He is replacing the stock. We concluded, on the basis of that, Mayfair Foods was receiving full service.

Now, we go to James Cox, and there was also testimony in regard to James Cox, which I think is also known as Jim's Grocery store, and I read the testimony of that gentleman. Now, Cox did not have a back room cooler so the deliveries were made to the dairy case. The driver made out the order, the driver cannot make out the order without at least looking at the stock, what is left. Generally speaking, the driver will build up to a certain inventory point in a case. That is, on a Thursday he knows from experience or discussion with the owner, there ought to be — pick a number — 50 half gallons of homogenized milk. In order to know how much to put into the case to make it reach 50, he has to count how much is there, so he has to inspect the stock in the case. The driver puts the milk in the case and rotated the milk in the dairy case so he certainly handled the merchandise. Borden ran the risk of spoilage. If there was out-of-date merchandise, Borden took it back so the driver had to handle that, so the merchandise was delivered to the case, the driver inspected the stock, rotated the stock, took back the out-of-date merchandise, so clearly there was a full type of service for James Cox.

Now, as we come down to the next group of stores, 8 stores, we relied upon the stipulation which had been entered into between counsel, and so we analyzed the stipulations for the next group of 8 stores.

In the case of Cardinal, the stipulation indicates that delivery is made to the cooler and the display case, that the stock is rotated, that the driver had to make out the order and the driver replaced out-of-date merchandise -- clearly the type of terms and conditions which qualify under the definition of Full Service.

Now, in the case of Bill's market --

MR. MATHIAS: I don't mean to interrupt, Your Honor, but I am wondering if it is necessary to go through and spell out in detail what is in these stipulations and what is in testimony.

JUDGE HINKES: I think we can probably dispense with that. I think it is sufficient to say that you examined the testimony and came to the conclusion it was Full Service based upon his testimony or upon the stipulation. I don't think we have to now recite the details of the testimony or the details of the stipulation. They will speak for themselves.

MR. FALLS: I just want to be clear as to the elements on which the witness did rely in reaching this conclusion and there are some little differences from store to store.

JUDGE HINKES: There may be but whatever differences there are, are not differences based upon Mr. Havemeyer's observation -- they are based upon a witness's testimony, which is in the record, or a stipulation which is in the record, or somebody else's testimony, like Mr. Pergler, which is also in the record, and there is no point in repeating it because, as a matter of fact, if Mr. Havemeyer has a misconception of what that testimony or record consists of, it does no good to have him repeat that misconception.

MR. FALLS: Let me ask a couple more questions.

By Mr. Falls:

Q Looking at the several customers -- there are 8 customers as to whom we relied on stipulation and concluded they received Full Service?

A Yes, I did. I did examine the stipulations.

Q Did you find any of those customers receiving service sufficiently different from, for example, what you described with respect to Mayfair or James Cox, to lead you to the conclusion that the service they received should not be characterized or classified as Full Service?

A No. The conditions were such that we came to the same conclusion for that group of 8 as we did for Mayfair and James Cox.

Q With respect to the remaining customers, at least down through Joe Milecki, do I understand that you classified them as full service based on route book notations saying either pack or check and pack, and Mr. Pergler's testimony with respect to what those notations meant?

A That is true with the exception of Strickland's, no. 256, which I think I should address separately.

Q All right. Would you address that one.

A Starting with --

JUDGE HINKES: Souldn't you also speak of Madison LaVeigne and Bell Park?

MR. FALLS: I really addressed my question to only those down through Joe Milecki, but I think you are right -- those 2 are in a separate category. Would you address yourself briefly to those stores?

THE WITNESS: Starting with Mayfair Foods, down through Joe Milecki, we found route book notations of "check and pack: or "pack". Mr. Pergler's testimony indicated what that meant, and in reading his definition of what those notations meant, we concluded that those customers were receiving Full Service. In the case of Strickland, no. 256, there was no notation in the route book for March 1966, but there was a notation in the route book for February 1966. There would be no reason to believe the conditions would change, but rather that the route man had just not posted it in the March book so the book for February 1965 indicates a notation which also led us to conclude, again, based upon Mr. Pergler's description or definition of those notations, that Strickland also received Full Service.

JUDGE HINKES: What was that notation?

THE WITNESS: It was either check and pack or pack. That takes us through Joe Milecki.

Now, in the case of Madison LaVeigne and Dell Park Foods, there was no testimony, no stipulation, no route book notation, and Mr. Pergler was asked about those 2 customers and after reading his description of how they were served, it led us to the conclusion those 2 customers were also receiving so-called Full Service.

MR. FALLS: I would now like to mark, as an exhibit, a document, a multi-page document entitled, on the first page, "Alternate Calculation For 20 "Other" Customers For Which Some Averages Were Originally Used". I guess we better, according to our recent practice, mark these individual pages.

JUDGE HINKES: Yes, please.

MR. FALLS: This is A&P Exhibit 201.

(The document referred to was marked for identification as RAPX 201(A) through (U)).

MR. FALLS: The first page then will be 201A. The next page, which relates to Theresa Crispino, will be 201B. If you look at the column headings, I think these are most easily differentiated by the name of the store. 201C is Barney Trainor, 201D is Bill's Market ---

MR. MATHIAS: Is there any need to mark this on the record?

JUDGE HINKES: No. I think we will go off the record.

(Off the record discussion).

JUDGE HINKES: On the record.

MR. FALLS: Let the record show then we have marked this Exhibit from 201A through 201U.

I would like to mark, as Exhibit 202, another multi-page document, the first page of which is headed, Recapitulation of Sales, 2 Weeks Ended 3-20-66 Borden Customer. I guess we better mark those also.

JUDGE HINKES: We will go off the record, at this point.

(Off the record discussion).

JUDGE HINKES: On the record.

Exhibit 202 has been marked A through F.

(The document referred to A&PX 202A through T was marked for identification).

By Mr. Falls:

Q Mr. Havemeyer, I believe you testified that in your original analysis of the O'Hare customers, there were 20 customers as to whom average figures were used for Price Per Point, Points Per Case and Proportion Class. Is that right?

A Yes.

Q Have you now made a further study in which you have examined the route books beyond what you did before and have recalculated your figures with respect to those 20 customers without using averages?

A Yes, we have.

Q Is that reflected in Exhibits 201A through U and 202A through T?

A Yes, that is right.

Q Would you explain what those exhibits show?

MR. MATHIAS: May I interrupt for one moment and point out on the record that the original calculations to which Mr. Falls referred, in his question, would be A&P Exhibit 179 for identification, I believe. Is that not correct -- so we can keep a straight record here?

MR. FALLS: Let me see --

JUDGE HINKES: I believe that is right.

MR. FALLS: Right. Okay, that is 179.

THE WITNESS: 202A through F is the underlying detail for the final calculations in 201A through J, so I will address myself to A&PX 202 first. Each page is a different customer, and on the left hand side of each page you have a printing of the quantity of each of the items taken for each of the 12 days indicated during that 2 week period. I think that is self explanatory -- Gallon Jugs -- well, the various products, as to the quantity taken of each item. Then, of course, there is a column headed "Total Units, which is the sum of the 12 columns. Those units have been converted to equivalent quarts.

In the next column, they have been converted to points, and two columns to the right. They have also been converted to equivalent cases, and then Total Points, then the Unit List Price, which is listed in the next to last column was extended by the quantity of Total Units, to get the figures in the last column, which is entitled Extended Price, so this is, I guess you could designate this as the raw data or input data which was then used to develop the statistics in the lower portion of the page, and these are various summaries which are used in other calculations -- Total Units, Total Equivalent Quarts, Total Equivalent Cases, Total Points, Total Extended Price, and then there are some ratios -- Equivalent Quarts Per Delivery, Price Per Equivalent

Quant., Points Per Case, Price Per Point, and Total Deliveries. The same kind of information is on each of these sheets for each of these customers.

Now, as indicated in earlier testimony, in the original A&P Exhibit 179 for these 20 customers, we had not gone to this detail but instead used some average data which it may be recalled was printed on a sheet at the back of Attachment VIII, A&P Exhibit 170 through 178, that is, on that sheet, we had shown how we developed certain statistics like dollars per point, points per case and Proportion Glass, based on analysis of 21 customers on 3 routs, 8 of them were complaint customers, and we used the averages shown on the bottom of that page in making the calculations of delivery cost and other calculations for the 20 customers listed in A&PX 202. Now, we are presenting 202, which is a replacement for the average figures and instead we now have available to us and did use the specific data for these 20 customers, just as we did originally for 8 customers, so those computations for those 20 customers have been carried forward into A&PX 201A through U, so A&PX 201 corresponds to summary sheets which purport to present the overview of discrimination or justification analysis. The difference, of course, for these 20 customers, is, as indicated on the cover sheet, namely A&PX 201A, that the calculations are based upon the specific data of price per point, points per case and proportion

THE WITNESS: That is right, Attachment 2.

By Mr. Falls:

Q Have you made a calculation or some investigation to determine what the effect would be if some part of the loading cost is allocated to retail trucks?

A Yes, I have.

Q Will you explain that?

A I refer you to the second page of Attachment 2, where you will see the forerunner of the method which I used and will explain today.

I will not go through that in detail except to try to refresh your memory that the first general step taken was to determine the amount of money which is shown at the top of the page which is the amount of money spent on the loading function.

The second step taken was to, then, determine the proportion or percentage that the volume of each of three categories was to the total volume.

Then, the third step taken was to apportion the expenditure of $26,700 among the three categories on the basis of that volume percentage.

The fourth step taken, then, was to divide the amount of money so allocated to the group or category, called regular wholesale by the number of cases loaded onto regular wholesale trucks.

So, that is the procedure which was followed. I am going to extend that procedure by adding a fourth category of retail. Inasmuch as that method apportions expenses on the basis of point volume, I will continue that method.

I referred to our A & P Exhibit 77 for a period of March 1966. This is an exhibit, which among other information sent out, the number of points sold via retail in O'Hare in that period. The retail routes at O'Hare were principally delivering retail points but they also included some wholesale points as indicated by the last two columns on the right of that sheet.

In other words, I multiplied the number of route days in that month, which was 875 by the volume per route, day, 565, points which equals 494,375.

So in effect, I added another category of point volume on the second page of Attachment 2, called Retail, 494,375. As you can see, that would change the total point number of points and in turn would change the percentages in the extreme right-hand column.

More specifically, the percentage for regular wholesale, which is on the first line, becomes 38.58 percent instead of 43.10 percent.

So, now when I apportion the expenditure of $26,756.29 to regular wholesale using that percentage which I just mentioned, the amount so apportioned is $10,322.58, instead of $11,531.96.

JUDGE HINKES: Would you repeat that figure again?

have to be changed now too, then, wouldn't it?

THE WITNESS: Yes, by six-tenths of a minute, sir.

JUDGE HINKES: Yes.

By Mr. Falls:

Q Now, come to a different subject.

You testified with respect to various of these categories of expense and where you took information from various Borden ledger accounts, or accounting records, and sometimes, you took the information for the current month; other times you took the information for the year to date, which was 10 months, and divided that by 10?

A Yes.

Q Using your number in each instance, as to which was the more appropriate?

A Yes.

Q Now, in the branch clerical expense, I think there, you testified that you used the current month figure rather than the 10-month average?

A Yes.

Q Could you explain why you exercised your judgement in that fashion with respect to that particlar expense item?

A Yes.

You, among other things, you must try to correlate or correspond, I suppose might be the word, the physical function or the activity and the expenditure and you maybe recall that in developing the clerical cost function onpages three through nine where it is finally shown on pages 3 through 9, that the method of doing this was to divide the, was to base it on the number of delivery tickets.

Well, we had no way of determining the number of delivery tickets for the 10-month operations.

We were able to determine the number of delivery tickets for october 1969. And, therefore, since that was the activity that we could determine, we had to relate to that activity the amount of money spent during that same period and felt that the month would be -- since we were heading for the cost-per-ticket, that it was appropriate, then, to divide the month's expenditure by the month's delivery tickets.

Q Now, the results of some testimony and cross-examination with respect to your allocation of credit and collection expense, since that questioning, have you made some investigation or analysis to determine the extent to which some of the independent stores may have been in arrears in the payment of their accounts, or may have had outstanding balances?

A Yes. I have.

MR. FALLS: Mark as A & P Exhibit 221, A and B, a document titled on the first page; Net Balance Due for Borden-Hammond customers.

XXX (The document referred to was marked A & P Exhibit 221-A and B for identification.)

By Mr. Falls:

Q Is that the document that was prepared?

MR. MATHIAS: Your Honor, could we have a brief look at this before questioning?

MR. FALLS: Sure.

MR. MATHIAS: We have never seen the document before.

MR. MATHIAS: 221-A and B.

MR. MATHIAS: Okay, I have had a chance to read it over.

MR. FALLS: All right.

By Mr. Falls:

Q Mr. Havemeyer, would you explain what does A & P Exhibit 221-A show?

A Yes, we looked into the balances on the bills of these various customers, and compared them to average weekly sales in October 1969 to get a feel for how far, what the outstanding balance was and how much this represented in terms of days' or weeks' sales, because I believe customers, or these customers, had said they had paid promptly.

For three customers, Joseph Tittle and Sons at Lake Street, Joseph Tittle and Sons at Village Park and Wilco Food Center in Gary, our copy of the Borden invoices for the two-week period ending October 18, 1969, were not sufficiently legible for us to read what the balance was.

So, I would be unable to say what it was. But in any case, column 6 includes the effect of fringe benefit expenses, so there is a reduction in cost justification of about -- well, the maximum is $.0008.

MR. MATHIAS: Excuse me. May I ask one question? I can't read on that last column 6 whether that is -- the line for Burger is $.0004 or $.0009. Which is it?

THE WITNESS: It is $.0004.

By Mr. Falls:

Q Now, turning to a different subject, can you recall, again on your voir dire and in connection with the calculation of Branch Clerical Cost for the Hammond customers, a questions was raised of whether that should have been calculated on the basis of the complaint customers' purchase of all products or on the basis of private label products alone?

A Originally -- I am sorry. Would you say that again?

Q I said, you remember some questioning on the calculation of Branch Clerical Cost for the Hammond customers -- you had calculated, I believe, using the entire product purchases of the complaint customers -- some question was raised as to what would happen if you calculated it on the basis of using only their private label purchases?

A Yes.

Q Since that examination, have you done some further analysis to determine the effect of basing that calculation on private label, equivalent private label items alone?

A Yes, I have.

Q Let me have marked then, a sheet entitled -- this will be A&P Exhibit 224, a sheet entitled, Hammond Branch Clerical (Supplemental Exhibit Showing Difference If Branch Clerical For Complaint Customers Computed on Private Label Alone)

XXXX (The document referred to was marked RAPX 224, for identification).

By Mr. Falls:

Q You have a copy of RAPX 224 in front of you. Was that a document prepared by you or under your supervision?

A Yes, it is.

Q Would you explain what that shows?

A It may be recalled that in the case of A&P in A&PX 135, after determining the cost per delivery ticket, which is now $3.3774, that this was first allocated between private label items and non-private label items on the basis of the number of line items that the customer took.

We have done the same thing in A&PX 224 for each of the other customers and you can see, in the first column of data, for each of those customers, the ratio of the number of line items for private lable versus All Items.

In the second column, we have multiplied the Cost Per Delivery Ticket by the ratio in the first column. This follows the procedure which we did for A&P.

In the third column there is a posting of the equivalent private label points per delivery and so in the fourth column we divided the cost per delivery ticket portion which was allocated to private labls or to the equivalents to private label by the number of equivalent private label points per delivery.

In the fifth column, we have posted the figure which now appears in A&PX 185, and finally, in the 6th column, we have shown the effect of the reduction in the cost difference between A&P and each of the other customers.

In other words, in the case of Wilco, the cost difference between A&P and Wilco has been reduced by one mil and so forth for the rest of the customers.

Q Okay. Now, again, going to a different and somewhat related subject matter -- do you recall, Mr. Havemeyer, that this question of whether for the complaint customers you should have considered all of their purchases or only the private label purchases -- that question was also raised with respect to the calculation of delivery costs?

A Yes.

Q And originally you had calculated the delivery costs for the complaint customers in the Hammond area using their entire purchases. Is that right?

A Yes.

Q Have you now made some further analysis which you have about whether or not the number -- I think it was .63 minutes per stop should have been allocated to the A&P stores in the Hammond area for the function which I think was called route bookkeeping?

A Yes.

Q It was brought out, apparently contrary to instruction some of the route men had made entries in the route books for the A&P stores?

A That is right.

Q Have you made some further analysis to determine what the effect would be on the cost comparison if you allocated to the A&P stores this time element for route bookkeeping?

A Yes, I have.

Q I would like to have marked, as A&P Exhibit 227A and B, a two sheet document entitled, Effect of Adding .63 minutes/stop to A&P Hammond Deliveries for Unnecessary Route Bookkeeping:

XXXXX (The document referred was marked as RAPX 227A and B, for identification).

By Mr. Falls:

Q Mr. Havemeyer, I think you have before you a copy of A&P Exhibit 227.

A Yes.

Q Is that something prepared by you or under your supervision?

A Yes, it was.

Q Would you explain what it shows?

A Yes. In adding this time to the A&P stops, we really have to go through two separate calculations because this has a double effect. One is the effect of the Cost Per Route Minute, which therefore effects all customers delivery costs, and, of course, it also effects the delivery cost to A&P inasmuch as we are adding that time to the A&P stores, so the first portion of this is to determine what effect this has on the cost per route minute.

There were 12 A&P stores on these 3 store routes receiving 27 deliveries in a month, and we are now adding .63 minutes per delivery, so we have added 204.12 minutes in the month.

Now, A&PX 185, page 183, already shows 33,126.868 minutes per month. The new total, now, of course, is the result of adding 204.12 minutes. Since there are 81 route days, we now have 411 minutes per route day. The cost per route day, as shown on page 163 is $185.83. That is now divided by the new number of minutes in a route day. That gives us $.4516 per route minute. The cost per route minute had been, as shown on page 163, $.4544. The ratio of the new cost to -- call it the old cost -- is the percentage shown on the next line, which is 99.3838 percent.

Now, we go to the second part of the calculation, and that is the more specific effect on A&P. There are two statistics there showing the number of private label points and the minutes assigned to private label as taken off page 19. We are now adding, since that represents 2 weeks delivery, 12 stores times 12 deliveries times .63 minutes equals 90.72 minutes. Following the principle explained before, the increased fixed minutes are allocated to private label on the basis of the variable minutes assigned to private label and on page 19 you will also find the percentage which is shown on the next line, 97.5603 so that percentage of the 90.72 additional affected minutes will go against the private label so that we have an increased number of minutes for private label and that, divided by the number of points, gives us a new figure of .0513. So this new minutes per point, multiplied by the revised cost per route minute shown in the upper portion of the page, gives us a revised cost per point for private label of .0232. As originally calculated, this was .0229, so we have increased three-hundredths of one cent per point. That is for A&P. Now, on the second page, we show the effect of the revised cost per minute on the other customers.

The first column of figures is taken off A&PX 185, pages 3 through 9. That is the delivery cost per point, as now reported. Inasmuch as the delivery cost per point is a result of 2 factors, the minutes per point and the cost per

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A Yes.

Q Pointed to by Complaint Counsel?

A Yes.

Q I would like marked as A&P Exhibit 228A and B, a two page document, the first sheet of which is entitled Recalculation of Loading Expense Per Case, at O'Hare Based on an Allocation of a Portion of Truck Loading Expense to Retail.

XXXXXX (The document referred to was marked RAPX 228A and B, for identification).

By Mr. Falls:

Q Was A&P Exhibit 228 prepared under your supervision or by you?

A Yes, it was.

Q Would you explain what it shows?

A Page A shows something I believe I described verbally a few days ago, and that is, I allocated the loading expense at O'Hare on the basis of point volumns to 4 categories of business, that is Regular Wholesale, Vendor, Bulk Wholesale and Retail, and again, following the same procedure as used in A&PX 170, I allocated the amount of money spent for this function to these 4 categories of business on the proportion of their individual point values to the total point values and accordingly, roughly 10 and one half percent of the cost would go against Retail and 38.6 percent pages following page 127, which get into the second set of categories, not only includes volume data, but also includes expense data.

Q In the course of your testimony, and particularly cross examination, there was reference to the use of the phrase, Dairy Broker, and the phrase, Distributor, as they appeared on some of these records. Are you familiar with the use of those terms in the industry?

A Yes.

Q What is their meaning in relation to one another in your experience?

A They are synonymous -- broker or distributor.

Q Now, again turning to somewhat different subject matter --

A Could I amplify one point before we go on?

Q Certainly.

A I want to be sure this point comes out, that in cross checking two different categories of Borden methods of categorizing volume, that by showing that both methods came to the same total, then gave me the information and knowledge that when I worked with pages 128 through 133, that I now had associated with Bordens categories of volume as expressed by the terms Milk Regular Distributor and Trailer Runs, I had associated with those volumes, the expenses which Borden said they spent on behalf of selling, delivering, advertising and having credit expense with those 4 channels of business.

Accordingly, then, having identified these categories, and having Borden documents which associated expense data with those categories, I had the information necessary then, as a starting point for analyzing delivery costs and advertising costs and selling costs and credit and collection costs for each of these categories or channels of business as Borden categorized them.

Thank you.

Q Now, as I say, turning to a different subject matter, I think there was some testimony -- again this relates to A&P Exhibit 185, and particularlly to selling expense. You testified that you transferred certain items from which were recorded on a Borden ledger or operating statement under delivery expense, some of those you transferred to selling expense?

A Yes.

Q In your examination of Borden's books and records, and particularly in relation to what you did in that connection I have just described, did you make any observation as to the manner in which Borden handled the delivery expense account, delivery expense ledger?

A Yes. I would refer you to -- well, any one of pages 128 through 133. It is really not necessary to pull them all out. The point I am indicating is that Borden accumulated all of its operating expenses under 4 categories. Take page

Yes, it relates, among other things, to page 6, Exhibit 188, the folder entitled J. Tittle, Valparaiso, and the transfer therein, I believe, the selling expense of $4,372.

A Yes.

Q Which I think you testified was the figure which had been shown on Borden ledger as the monthly expense, or the expense for that month, and you indicated that you had used that figure rather than a figure which could be obtained by taking the 10 month figure and dividing by 10.

A Yes.

Q Would you tell us why it was you took the figure per month rather than the 10 month average figure?

I think this may also relate to pages 131 and 137 of Exhibit 185.

A Yes. I think it would help if we start off with page 131 and 137. In fact, lets look at 137, and look at the next to last line, that is the line above the word, Total, which was transfers from other departments. Please recall that although this page has, as its title, Delivery - Dairy Broker, I indicated before that that transferred amount came from the Selling Account. Lets concentrate on that line, Transfers from Other Department, and notice that they indicate the trend, for example -- look at the 2nd and 4th column of data. Now, that is the corresponding data for the month and year-to-date of last year.

Now, last year, for the 10 months, there was a figure of 23,911, approximately 2,391 a month, but in the month of October, last year, the month of October, itself, they spent more than the monthly average, $2,668. Now, have that in mind, and also look at this year's data. The first column is this month and the third column is year to date. You will find that the year to date monthly average is $3,108. It is higher than the monthly average of last year and the monthly average of this year is higher than the month of October of last year, and finally, when you look at this months data, $4,372, that is even higher than the year-to-date monthly average, so it certainly indicates that Borden had experienced an upward trend in the selling costs. Therefore, we felt, in view of that, those facts exhibited by this data, that the months data for 1969, that is the $4,372 was the one which represented current conditions in what Borden was experiencing. It was consciously spending more and more money on selling in that area, so when we went to page 6 of the Valparaiso folder, which is A&PX 188, the way we analyzed the expenses, where we analyzed the expense information, you will notice that we, indeed, did use a transfer which represented the amount spent in October of 1969, since that certainly seems to represent the current conditions.

Q So if you used an average based on a prior period, that might not accurately reflect the quantum of monthly expenses associated?

A That is right.

Q On the other hand, on making your calculation with respect to the wholesale routes operating out of Hammond, and again on the selling expense, and I think we have to look there at page 165, Exhibit 183, there, in making your deduction from expenses, which you had added up for that purpose, you used the 10 month average figure, which was $3,107.72 as the amount which you deducted from those expenses. Is that correct?

A Yes.

Q Why did you do that?

A Well, please look at the column, the 4th one from the right, which has a tabulation of letters, and those letters, A or B indicate whether we used the data from the current month, which would be Column A, or the data from the year-to-date month, which would be column B. I am on page 165, and it may be recalled, in my testimony on this page, as we went down the list of accounts, supplies, legal expense and so forth, that for various reasons, we believed that the year to date figure was more representative of the selling expenses in Hammond. The fact that you will find, starting with supplies, and continuing right on down through miscellaneous expenses, in each case, we used the year-to-date monthly average. Accordingly, when it came to looking at the transfers, it seemed to us for this account, Selling in Hammond, that it was appropriate to continue using the year to date monthly average. In fact, when you look up at Wages, Supervision, the very first line, although it indicates that the figure was taken from Column A, which is the current month, you will find that that figure is very close anyway to the year-to-date monthly average. The current month would be $1,866. The year to date monthly average would be $1,108, so even the first line, which is indicated as column A, almost as well say Column B. My point is that as we went down this list of expenses, and we, in all cases, except one, including only the second line as an exception, we used year-to-date figures, and it seemed, therefore, appropriate to continue for this account in Hammond, to continue using the year to date monthly average as far as the transfers were concerned.

Q In other words, having used the year-to-date figures for the additions to the account, it seemed appropriate to use the year to date figures for the subtractions?

A Yes.

Q That is all I have by way of redirect. As you know, we still have one additional exhibit which is unrelated to --

MR. [illegible]: Why don't you put it in.

JUDGE HINKES: I think it might be advisable for you to continue, Mr. Falls, so we can at least assume that you have finished your examination of the witness, and you have proffered your exhibits for reception in evidence, and then let Mr. Mathias be heard from.

MR. FALLS: I have no objection to that, Your Honor, if that is what you prefer.

By Mr. Falls:

Q All right, then, there was an additional exhibit which is somewhat unrelated to the series of exhibits we have been going through, which is not proffered by way of redirect, but by just direct examination, and this is a -- let me have marked, as A&P Exhibit 230A, B, C, and D, a 4 page document entitled, on the front, Comparison of Discounts Received by O'Hare Customers According to CX183 and Under the Borden Published Discount Schedule During March, 1966.

XXXXX (The document referred to was marked RAPX 230A, B, C and D, for identification).

By Mr. Falls:

Q Mr. Havemeyer, is A&P Exhibit 230 a document prepared by you or under your supervision?

A Yes.

MR. MATHIAS: I am going to object to any further testimony on this exhibit on the basis it was not provided in accordance with Your Honor's pretrial order. It again, was an exhibit presented to Complaint Counsel some time after the beginning of the hearings on defense. Moreover, it is merely cumulative. A&P counsel has produced testimony on the record to the effect most of the customers on Commission Exhibit 183 received more than the discount which they would be entitled to, based on the Borden published discount schedule, and that a couple did receive their rebates in accordance with those published schedules. This adds nothing to that testimony of I believe, Mr. Pergler -- and it was not provided to Complaint Counsel in keeping with your Honor's pretrial ruling.

MR. FALLS: Your Honor, in our original designation, we had included, under Item 4, I believe it was, the statement we would submit a chart preparing Borden's Cost of Service, A&P Stores, in Metropolitan Chicago Against Borden's Published Price Lists, and Discount Schedules.
At a later time, we withdrew that particular exhibit and we then prepared the exhibit that I have just marked, which is slightly different way of approaching the same subject matter. This was provided -- I mean, this document we now have was provided quite sometime ago to Complaint Counsel. I think they have had adequate opportunity to review it. I think Mr. Foley remembers exactly when it was supplied, but it was quite sometime ago. Since this was a subject matter previously stated as being one we would get into, and since there has been considerable notice of this particular document, which is

not of enormous complexity, it seems to me not inappropriate it be allowed.

JUDGE HINKES: Just what is the lapse of time that is involved here, Mr. Mathias?

MR. MATHIAS: The first copy we have in our files of this type of exhibit is marked, in Mr. Bitting's handwriting, Received 4-26-74.

JUDGE HINKES: And the due date for the exchange of exhibits was when?

MR. MATHIAS: Was in February of 1974.

JUDGE HINKES: And when was the original exhibit which was later withdrawn submitted?

MR. FOLEY: The exhibit was not submitted -- we had 3 exhibits -- this particular exhibit, or a comparison of the discount actually received with the discounts, published discount schedule, plus the 2 cost justification studies, the O'Hare and Hammond studies, Your Honor will recall, at the last prehearing conference that we had before the commencement of A&P's case, that A&P had not yet completed any of those 3 cost justification analyses, and we so advised Your Honor, and stated we would produce them as soon as it became possible for us to do so, which we did. In the course of preparing the other 2 cost justification exhibits, we set this particular one aside and did advise Complaint Counsel, at about the time that we first produced the Hammond and O'Hare cost justifications

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that we intended not to offer this particular exhibit, or an exhibit of this nature, which would compare simply against the published discount schedule. Thereafter, in the course of the proceedings, on or about April 26th, as Complaint Counsel states, we did advise them that we had prepared an exhibit, and give them a version of this. The one which is now before Your Honor is not the same one we gave Complaint Counsel.

MR. MATHIAS: Your Honor, Complaint Counsel were notified that an exhibit of this type would not be presented. We did not demand any such exhibit in the course of the rest of our pretrial demands. We were approached a couple of weeks ago, about April 26th, and handed a version of this, and now, May 22nd, we are handed a revised copy of it. I do not believe this complies with Your Honor's pretrial ruling and furthermore, as I stated, the material is merely cumulative, in any event.

JUDGE HINKES: Under all of the circumstances, I am going to sustain the objection to this document. Complaint Counsel, it seems to me were entitled to rely on the representation that no such document was going to be offered or discussed, and even if that were not so, the document that is now under discussion is a recent revision of one which was submitted to Complaint Counsel around April 26th, if I understand correctly?

MR. MATHIAS: Yes, sir.

JUDGE HINKES: All of this, I think, is a delated attempt at compliance, and I don't think it would be fair to Complaint Counsel to burden him with the necessity of examining documents which come in so late in the proceeding. Coupled with this, if it is true that the matter has already been covered in testimony, I think that further examination, pursuant to this document, which is questionable under the circumstances, would be inappropriate. I shall not permit the discussion of this document. You may explore the issue with your witness, if you care to, but I don't think you would be entitled to discuss this particular exhibit.

MR. FALLS: Let me put a few questions to the witness, along those lines, without reference to the exhibit, Your Honor.

JUDGE HINKES: All right.

By Mr. Falls:

Q Mr. Havemeyer, did you make the study of the discounts actually received by the various O'Hare customers in comparison with the discounts to which they would have apparently been entitled under Borden's published discount schedules?

A Yes, I did.

Q Did you find that the O'Hare customers, in fact, received the discount which the published discount schedule said they were entitled to receive?

A No. In fact, very few received what the discount schedule would have indicated.

JUDGE HINKES: Does that mean they got more or less?

THE WITNESS: They got different.

By Mr. Falls:

Q Can you generalize as to whether, in general, these customers got more or less than the published discount?

A In general, they got more.

Q Do you know, in how many cases all of these customers received less than the published discount?

MR. MATHIAS: I would like to note the witness is now going to look at the document which he has just been told not to discuss.

JUDGE HINKES: Well, there is a little difference. I think the witness is entitled to look at anything that will help him recall the answer, even if it is a document that is not receivable in evidence.

I would ask you though, Mr. Havemeyer, to first attempt to answer without looking at anything, so that we can be sure that your answer, if it is dependent upon a document, is so noted on the record.

Can you answer without looking at the document?

By Mr. Falls:

Q Let us make one thing clear -- is it a fact the customers you are now speaking of are O'Hare customers listed on Exhibit 183?

A Yes, they are those customers.

JUDGE HINKES: Do you recall the question that was just asked?

THE WITNESS: Were there any customers that received less than what the discount schedule would indicate?

I knew there were a few but I did have to look at it to remember there were only 2.

By Mr. Falls:

Q Now, with respect to those 2 who received less than the published discount, can you tell us who they were and in what amount a discount they received was less than the published discount?

A I would have to look at the document.

Q May I ask you to refresh your recollection then by looking at the document?

A Edward Marszaich received 0.6 percent less, and Bruno Nalepa received 2.0 percent less than would be indicated by the discount schedule.

Q What was the maximum amount in excess of the published discount any customer received?

A I believe the maximum amount in excess of the schedule was 12 percent.

Q Do you know who received that?

A No. I would have to look at the schedule for that.

Q Could you ascertain that by looking at the document?

A Yes, sir.

Bill's Market.

Q What was the next greatest, after 12 percent?

A 10 percent.

Q Were there a number of customers who received 10 percent more than the published discount?

A Yes.

Q Can you identify that?

A I have to look at the document for that.

Q Would you do so, please.

A Strickland Store No. 256 received 10 percent more than the schedule would indicate. Bill's Market No. 194 received 10 percent more. Gene's Food Shop received 10 percent more.

Q Is there one other that received almost 10 percent?

A There is one that received 9 point something. Barney Trainor received 9.6 percent more than the schedule.

JUDGE HINKES: Then, you have finished your examination of Mr. Havemeyer. Is that correct?

MR. FALLS: Excuse me just a moment.

I think I have completed my examination with 2 possible exceptions, Your Honor. One is there may be some further redirect occasioned by Mr. Mathias's additional examination.

JUDGE HINKES: Yes.

3036 MR. FALLS: Those are the ones as to which I wish to make an Offer of Proof, Your Honor. Those are the ones you indicated would not be allowed, relating to Dr. Solverson's Time Standards. I thought I would handle those separately although maybe you would want me to include them in this list.

JUDGE HINKES: I think they should be included simply because there has been no ruling on the record.

MR. FALLS: All right. That would then make it 139 through 221.

JUDGE HINKES: And then 223 --

Mr. Falls: Through 229.

JUDGE HINKES: Very well.

I think, with that statement, we can recess for the day and start with your cross examination, Mr. Mathias, tomorrow.

MR. MATHIAS: I would have one question. Since Y ou Your Honor has made a ruling on RAPX 204 to 218, not even questions could be allowed dealing with those, due to failure to follow the pretrial order. It would seem to me that those documents could be ruled as rejected and sort of simplify the offer. As a matter of fact, I thought they had been ruled as rejected.

JUDGE HINKES: If they have, I simply neglected to note that in my notes. I will have to look at the transcript.

A Yes.

Q Now, do you know, sir, who excluded the studies referred to as the South studies, Forest studies and Englewood studies from these observations, sir?

A Yes, it would have been Mr. Waterhouse who was in charge of that project.

Q Now, sir, referring to A&P Exhibit 197E, which shows a number of studies in the Elston Division, and the notation at the bottom of the page, "These studies not used in standards". Do you know, sir, who excluded these studies from the Time Standards?

A Mr. Waterhouse.

Q Now, sir, referring to A&P Exhibit 197A and F, I notice that there were 56 studies listed on 197F, but the most studies used in making any of the determinations on 197A is 55. Now, sir, can you tell me which of the studies on page 197F were not included in any of the observations on page 197A?

A I can't tell you, now. I knew at one time but I don't know which ones they are, now.

Q Now, sir, on page 197A, there are only 3 items which list the number 55 under the number of studies in connection with that item and that the other items vary from 22 to 47. Can you tell us, sir, in any one of these instances, or all, which of the studies referred to on page 197F were not included?

A No, I cannot tell you now because the working papers -- the more detailed working papers are no longer available. I knew at one time. You point out on 197A there was one element there. There were as few as 22 studies used. Please note that pertains to unload cases at plant, which is an element or time standard which is not included in the standards used in this proceeding because that function is not performed by the Borden driver.

Q Mr. Havemeyer, you are being paid by A&P for your appearance and testimony in these proceedings, are you not, sir?

A Yes.

Q And you and the Case & Company are being paid and have been paid by A&P for the various computations you have presented here as well as the underlying computations and attendant services, are you not?

A Yes.

Q Now, sir, it is true, is it not, that this case is the only litigated case in which you have presented a Robinson-Patman cost justification study that you have prepared. Is that not correct, sir?

A No.

Q Which other Robinson-Patman cost justification study have you prepared and presented, sir, in court, in a litigated case?

A The same type of study was done in the case of Bowman Dairy.

Q You did not appear in the Bowman Dairy case, did you?

A No, but I did the study.

Q You worked under his supervision, did you not, sir?

A Yes, but I did all of the documents.

Q What is the only other litigated case, is it not, sir?

A There is one under way now but it is not Robinson-Patman, but it does involve cost studies.

Q But there are no other Robinson-Patman cost justification studies you have prepared and presented in a litigated case?

A No.

Q Now, sir, you stated, in your direct testimony, that you prepared a cost manual for the State of Wisconsin. Is that correct, sir?

A Yes.

Q And that was approximately in July of 1966, was it not, sir?

A That sounds too late. I would say it was earlier.

Q That is the date -- I imagine the work was done earlier -- that is the date of the cost manual, is it not?

A Wait a minute. Let me see the manual you are referring to, please.

Yes. You understand we did not prepare the smaller booklet in the front of this ring binder. That is a reasonable judgment as any particular day or week may not represent the long run current conditions. Unless methods have changed recently, manning tables or schedules for the last 6 months should be used. In the absence of such tables or other records, visual observation or work sampling must be employed. Changes in manning tables or methods of operation shall not be considered in a cost analysis until such changes have been reflected in expense records for a 30 day period subsequent to such changes".

Sir, did you author or was this paragraph written under your supervision or direction?

A Yes.

Q The next item on that same page, entitled, All Other Items, there is a statement:

"A 6 month minimum expense experience should be used to reflect recent long term costs. In the case of -- strike that. I don't think that is relevant there -- just the one statement -- "A 6 month minimum expense experience should be used to reflect recent long term costs".

Sir, did you author, or was that statement written under your supervision and control?

A. Yes.

Q Above, at the top of the page, in the second paragraph, there is a statement:

"In general, a period of sufficient length should be selected to cover cyclical and seasonal fluctuations but yet represent current methods. The month in which the price action occurred that triggered the complaint or investigation must be included".

Did you author or was that authored under your supervision and control, sir?

A Yes.

Q Now, sir, in your various cost calculations, the 3 main ones being the O'Hare Branch calculations, the Hammond, Indiana calculations and those dealing with Borden's anticipated profits, what did you interpret the term, selling expense to include?

MR. FALLS: I object to this for a moment. The only thing I think needs clarification is, interpret the word, as used where? In some ledger or Mr. Havemeyer's own papers or -- there seems to be some ambiguity there.

MR. MATHIAS: I would like to have the question reread. I believe it is a perfectly proper question. This is cross examination. Mr. Havemeyer has used this term in several different calculations. If it has a different meaning in each of those , he can explain those.

MR. FALLS: Are you asking him what he means when he uses it in this particular context or what he thinks it means as used in other documents not prepared by him?

MR. MATHIAS: I would ask that my question be reread.

JUDGE HEMKES: Lets have the question reread. It may need some more specificity.

(The pending question was read by the reporter).

JUDGE HEMKES: I think you will have to be more specific, Mr. Mathias. Your question starts out, I think, with the connotation as to what his use of those words was meant to convey, but it winds up asking what those words meant when used by others? I am not sure what you mean.

By Mr. Mathias:

Q Sir, I will restate the question.

Mr. Havemeyer, you have made a number of cost computations that have been presented here; as I have stated, the 3 main ones are your O'Hare Branch calculations, your Hammond calculations and the anticipated Borden profit computations.

Now, sir, in the course of your various calculations, one of the items that you have allocated in each instance is Selling Expense. Now, my question is, sir, what is your interpretation in connection with these 3 calculations? What interpretation did you make of this term and what would your definition of this term be?

A Well, I can answer that now that you have changed the word to definition, because definition, I interpret to mean what did I mean by the word, selling, rather than what did Bord mean by the word, selling. All right?

Q All right.

A I meant selling to exclude the function of delivery, the physical delivery and the necessary support activities and expenses for physical delivery, and so that would encompass a number of activities such as calling on accounts or prospective accounts.

Q Would that be by salesmen, sir?

A Salesmen, yes, maybe I said this, servicing present accounts, whatever the reason may be to sell more product or answer complaints, but, in general, that function.

I don't know how to expand on that.

Q And this is the interpretation you used in your analysis of the Borden records. Is that correct, sir?

A I should also make another distinction. You may recall also having merchandising --

Q You are getting ahead of me. What is my next question.

A There is a preparation point there. You have 3 functions -- physical delivery or distribution as we call it, selling and merchandising.

Q Now, how did you define merchandising, sir?

A Merchandising was more specific to, I guess you would call it at-store support. I mean, at-store is hyphenated, such as promotional material that might be used there, equipment that was given or loaned to display products, that nature.

Q Sir, I see the witness has been on the stand about an

A Through April, not including May, about $125,000 in fees.

Q How much time, approximately, has been spent by you and the members of your staff in connection with that?

A In excess of 5,000 hours.

Q Would that study have been easier had it been conducted at a time more contemporaneous with the events in question?

A Yes.

MR. MATHIAS: I object, Your Honor. It is beyond the scope of cross.

JUDGE HINKES: Sustained.

MR. MATHIAS: I would ask the answer be stricken.

JUDGE HINKES: The answer is stricken.

MR. FALLS: That is all I have.

M[illegible] MATHIAS: No recross, Your Honor.

JUDGE HINKES: One question, Mr. Havemeyer. Is your fee, or any part of it, contingent upon the outcome of this case?

THE WITNESS: No, sir.

JUDGE HINKES: No other questions?

You are excused, at long last, Mr. Havemeyer.

(witness excused).

JUDGE HINKES: Now, let me ask you, Mr. Falls, have you completed your case, at this point?

MR. FALLS: With the exceptions that I previously mentioned, Your Honor -- the question of the Borden witness or understanding of Mr. Bitting's testimony, I am going to allow him to continue his testimony.

THE WITNESS: Borden had a product line of about 37 products. Four of those products are listed or named in the document which shows media advertising. Now, the fact that up to four different products are named and described in advertising does not mean that Borden was advertising only those products. This is a typical advertising-marketing practice of commerical companies who have a line of products.

That is, due to the expense of time on television or space in magazines and newspapers a company does not try to list or explain or advertise all of its many products. Instead, its purpose in such advertising is to direct the reader's or listener's attention to the line of products, to the brand name, if you will. The purpose of that being to influence the customer to reach for that brand of products when the customer is in the store, not necessarily just to reach for Thirstee-Smash or Lite-Line or dips or the other product which is named which you are talking about here.

So, the expense shown for those four products is really an expense that is created or incurred for advertising the line of products.

Now, this is similar to what can be found in other industries and other product lines. I will draw upon two examples, one of which is cars.

Chevrolet Motor Division has quite a line of cars and trucks and those cars are different styles and different sizes and different horsepower ratings and different seating capacity and they are different colors and they have different optional features in them.

The Chevrolet Motor Division does not try to list or describe each one of those combinations or options in its advertising. Instead, it will select a relatively small number of automobiles or models or optional features to talk about in their advertising program and campaign. So, this is somewhat like what we are talking about in the case of advertising of Borden's line of products.

Let's take another example of consumer products, soups. Campbell's Soup Company has quite a line of soups, but yet in its advertising on television and its advertising in newspapers and magazines it does not try to direct the reader's or listener's attention to every one of the flavors of soups they have.

They will concentrate on one, two, three, or possibly four flavors of soup to capture the reader's or listener's attention with respect to the brand name. Again, the purpose being to get the reader or listener to reach for Campbell's soup, not necessarily just Campbell's chicken soup.

And similarly, not just to reach for Chevrolet's four-door, green-colored car with power options, and not just to direct the customer to buy Lite-Line, but rather to reach for the Borden line.

So, this is the nature of advertising in the commerical world, namely, with a line of products where there are many possibilities of products to be purchased by the consumer that the customer's attention is directed to the brand name.

MR. MATHIAS: Your Honor, before the next question is answered, I have an objection and I want that entire answer stricken and I would like to note that I allowed the testimony to go into many, many irrelevant areas to prove just the baselessness and the irrelevancy of the answer that Mr. Havemeyer was giving.

Now, we have heard an awful lot about general industry practices by Chevrolet and Campbell's soups, but we haven't heard any specific facts about these particular advertising campaigns.

The testimony, as given by Mr. Havemeyer, is totally without foundation and is totally irrelevant to these proceedings and therefore should be stricken.

JUDGE HINKES: I will not grant that motion.

I am disturbed by the very same things that you mentioned, Mr. Mathias, but I am going to allow the testimony to stand. Perhaps we will have some further development along this line, but in any event I think that the objection goes more to the probative value of this testimony, something that I must admit disturbs me a little.

You may continue, Mr. Falls.

By Mr. Falls:

Q Mr. Havemeyer, is the analysis and reasoning you have just set out the basis on which you allocated this advertising expense to Borden label products generally, rather than merely to the particular products that were listed in the advertising?

A Yes.

Q Have you followed a similar technique or practice with respect to other industries or other products?

A Yes.

Q Now, have you prepared an exhibit which would illustrate the effect of charging the entire cost of this media advertising of the specified Borden products to the particular product rather than allocating it generally to the Borden product line?

A Yes, I have.

MR. FALLS: We would like to have marked as RA&PX-244 a spread sheet titled "Calculation of Advertising Cost in Relation to Product Selling Price if Borden Advertising Expense is Assigned Only to Specific Items Advertised."

(The document referred to was marked Respondent Exhibit RA&PX-244 for identification.)

By Mr. Falls:

Q Mr. Havemeyer, is RA&PX-244 an exhibit which was prepared by you or under your supervision?

A Yes, it is.

Q Would you explain what it shows, please?

A Yes. We have analyzed the expense, the media advertising expense, for three of the four products named. Thirstee-Smash was not sold during this period so we have concentrated on three products, which were yogurt, Lite-Line milk and dips.

In column A we have posted information which comes from source documents already in the record, shown by footnote one as RA&PX-234, page 88, and it also appears on RA&PX-90, page C.

Q Page six?

A C, capital C. This is the money, per the Borden records, which was spent for media advertising for those three products.

In the next two columns I have followed the procedure already followed in the Case and Company studies to allocate that expense to a certain geographic area, and also to include what we called "Production Expense," which is the expense necessary to develop the materials which will then appear in the advertising media.

So, in column B I have multiplied the figures in column A by 119 percent, the 19 percent representing the production expense and which is the same approach which I have previously taken in the cost studies in the record.

In column C I have allocated the figures in column B to represent that portion of the media advertising and production expense that would be attributable to the Gary-Hammond Area.

It may be recalled, in our cost studies, that we had allocated these expenses on the basis of relative population, and the population of the Gary-Hammond Area was 7.17 percent of the population of the area covered by the advertising media. So, the figures in column B have been multiplied by 7.17 percent to get the figures in column C. So, up to this point I have allocated the media advertising plus production expense to the Gary-Hammond Area.

I will now turn attention to sales quantities of these items.

In column D, I have posted the quantity sold of each of these three products from RA&PX 75, which represents the cumulative sales for 10 months of the year. In column D, I have extended that by 20 percent in order to get an approximate annual quantity that would be sold of each of those three products.

The figures in column E are 120 percent of the figures in column D.

Now, similarly I want to associate a portion of those area sales for those three products to the Gary-Hammond Area and

I do that in column F through a ratio of .2179104, which is explained by footnote two. This ratio is determined by two volume figures which appear in, one in RA&PX-75, and one in RA&PX-80. Namely, the Sales Volume, Milk Regular Hammond, which is a definite category expressed in RA&PX-80, a figure of 959,354 points and I divided that by the total points in the Hammond Area of, when I say Hammond Area now I mean the whole Hammond Branch, which were 4,402,514. That division results in the ratio of .2179104, and that ratio, therefore, was used to determine that portion of the total sales shown in column E that would have been sold in the Gary-Hammond Area.

In column G I have determined the advertising expense per unit for each of the three products by dividing the expense shown in column C by the unit sales in column F.

So, for example, in the case of yogurt it would be $2,763 divided by 63,778 units, or a cost of 4-1/3 cents per unit of yogurt.

A similar calculation was done to get the cost per unit of Lite-Line milk and the cost per unit of dips.

In column H, I have posted the list prices for these products taken from CX-135.

In column I, I have posted as an example the net price which Tittle market at Lake Street paid for these three products and they are .2127 -- let me say that again, they are

21.27 cents for yogurt, 41.06 cents for Lite-Line milk, 29.89 cents for dips.

Finally in column J, I have determined the relationship of the advertising cost per unit to the net sales price which Mr. Tittle paid, and it shows that for yogurt the cost of advertising was 20.36 percent of the net price paid by Tittle. In the case of Lite-Line milk it was nearly 140 percent of the price paid by Tittle. In the case of dips it was nearly 164 percent of the price paid by Tittle.

This means disregarding all expenses of material, processing, packaging, distribution, selling, et cetera, et cetera, just the cost of advertising, if charged specifically to those three products, would in the case of Lite-Line milk and dips greatly exceed the price received by it.

It shows how ludicrous would be the analytical method which would be based upon the assignment of media advertising cost to the specific products that happen to be named in the advertising.

MR. FALLS: I would like to offer RA&PX-244.

MR. MATHIAS: If it is to be received in evidence at this point, I would like some voir dire.

JUDGE HINKES: Very well.

VOIR DIRE

By Mr. Mathias:

Q Mr. Havemeyer, referring first of all to columns H and I, the list price and the net price to Tittle for these products on the line entitled Lite-Line milk I see by the footnotes you have used the two percent product rather than the Lite-Line as the item which you have priced in this column. Why is that, sir?

A First, with respect to the list price, the price list which was in effect in October was one, I believe, dated May of that year and that was the price in effect at October, which was the point of analysis, and at that time there was not actually any sale of Lite-Line although by the end of the year there had been some advertising spent on Lite-Line by the end of the year.

So, I used the price for Borden's two percent as being a -- first, there was a price for it and secondly, it was a somewhat comparable product.

Q Lite-Line milk was not included in the May, 1969, price list, is that correct, sir?

A That is right.

Q It was included in the following price list dated December 1, 1969, for Hammond, was it not, sir?

A Yes.

Q Is it not true, sir, that in December of 1969, that Lite-Line milk half gallons had a list price of approximately four cents higher per half gallon than Borden's two percent?

A I think that is right.

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Q Isn't it also true, Mr. Havemeyer, that in the interim period as early as August of 1969, that in the invoicing of these products to customer Tittle-Lake Street, for instance, that Borden charged less for two percent milk than it did for Lite-Line milk?

A I don't recall that specific point.

Q But you did use the two percent price from the Tittle invoice, is that correct, sir?

A Yes.

Q Mr. Havemeyer, I am handing you the invoice to the Tittle-Lake Street store for the week of August 4th through August 9th of 1969, and I would like you to check the price listed there for Lite-Line and for two percent milk half gallons.

A The price indicated for two percent milk in half gallons on line 23 of this invoice is 41.9 cents. The price listed for Lite-Line on line 66 is 44.6 cents.

Q It is true, is it not, Mr. Havemeyer, that Lite-Line was a new product during this period of time?

A I am not sure how to answer that. It may have been new in Chicago, but not new elsewhere. I don't know the answer to your question.

Q Do you believe it was new in the Chicago area, at any rate, at this point?

A Yes.

Q In connection with that, Mr. Havemeyer, I would like to show you RA&PX-75, the third page thereof, which is a summary of Fluid Milk Sales-Hammond-October of '69, and I would call your attention to the line marked "Lite-Line", and ask you if it is not correct that on this record of the Borden Company that wherever there is a reference to last years sales that space is blank, indicating there were no such sales the previous year, is that correct, sir?

A Yes.

Q I would like to note also that in the Year to Date Sales there were 36,422 units of this product sold and that over one-quarter of those had been sold during the month of October, 1969, is that not correct, sir?

A Yes.

MR. FALLS: Could I have the last question and answer read back?

JUDGE HINKES: Sure.

(The record was read by the reporter.)

By Mr. Mathias:

Q Referring back to RA&PX-244, columns D and E, where you have taken the 10 months unit sales of Lite-Line milk and factored them up for an estimated 12 month unit sales, this would effect your calculation in that regard would it not, sir?

MR. FALLS: I am not sure I understand the question, John, when you say this woud effect, what do you mean?

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By Mr. Mathias:

Q If you had used the current month sales and multiplied by 12 instead of averaging these sales over a 10-month period, the answer would have been different, would it not, sir?

A Yes.

Q Now, sir, referring to columns D and E giving the quantity of the sales of dips for the 10-month period and the estimated for the 12-month period, your source reference for that is respondent's A&P Exhibit 75, is that correct, sir?

A Yes.

Q I take it that although it isn't stated here that is, again, the third page of RA&PX-75 entitled "Summary of Fluid Milk Sales-Hammond, October, 1969", is that correct, sir?

A I think so. Let me check the numbers, please. Yes.

Q I would note, Mr. Havemeyer, that there are two lines entitled "Dips" on this page, one showing a Total Sales, Year to Date of 123,129 units and the other down lower on the page of 2,272, which you used, is that correct, sir?

A Yes. The first one you referred to on line 29 comes under the general heading of "Creams".

Q And the second is "Imitation Filled Products"?

A Yes.

Q Why is it that you selected the second of these entries, sir, under the Imitation Filled Products?

A As being the product for which I had both volume information and price information.

Q Where is the price information for Imitation Filled Dips, sir, where do we find that?

A Well, in the case of Mr. Tittle, it would be on RA&PX-234, page 96, the net price for that.

Q How can you tell from this analysis or the original invoice, sir, that is the Imitation Filled Dip rather than the Sour Cream Dip?

A Could I also look at the CX-135, please, and maybe 36. I am not sure what page it is on.

Q Here is CX-135, sir.

It might help if I would note, Mr. Havemeyer, isn't it true that the list price for Sour Cream Dips shown on CX-135 is the one which appears in column H on your exhibit?

A That is right, and I am trying to recall what reference I had in the record which led me to the point of identifying what you point out is called "Filled Imitation Product Dip" as being the product which I used and could make reference to both price and net price, and I can't recall what that reference is.

Q Looking at RA&PX-75 for a moment, sir, the Borden document, isn't it true that there are no sales shown on this column for the previous year or for previous months of this year?

A That is right.

JUDGE HINKES: For what products?

3058 MR. MATHIAS: For the Imitation Filled Dip.

THE WITNESS: Of course that sort of highlights a point you were making before on the Lite-Line. You were pointing out Lite-Line was a relatively new product in the area and you associated that was associated with the media advertising. Now, here again we have the imitation dips which weren't previously sold in the area and the advertising associated with that.

By Mr. Mathias:

Q So, this would appear to be a new product also, is that your point, Mr. Havemeyer?

A Yes.

Q Isn't it a fact that at this point you can't tell us whether or not the media advertising referred to on RA&PX-90 was associated with either the Imitation Filled Dip or Sour Cream Dip?

A As I mentioned before, I can't recall the reference I had in mind which led me to this. But a point you brought up now would indicate the very facts you brought up on Lite-Line milk would support what I have used in the case of dips in a new product.

Q But you do not know from your own knowledge which of these products the media advertising was associated with, the Sour Cream or Imitation Filled Dip, is that correct, sir?

A Yes. I said I can't recall the reference that led me to that conclusion.

Q You can't give us any evidentiary reference at this point to anything that would support that position, is that correct?

A That is right.

Q Referring back to RA&PX-75, page 3, and to the line for Yogurt, if we can find it here, noting on the line for Yogurt under the Year to Date, the sales are 243,902 units. That is the figure you have used on RA&PX-244, is it not correct, sir?

A Yes.

Q That is the Year to Date Sales for October, 1969, is that not correct?

A Yes.

Q Referring to the previous year to date for October, 1968, there were only 60,247 units of yogurt sold during that period, was there not, sir?

A Yes.

Q I note, sir, that CX-135, the price list only refers to Borden yogurt, is that not correct, sir?

A Yes.

Q And the list price shown there for Borden yogurt is the 32 cents, which you have used in column H of RA&PX-244, is that not correct, sir?

A Yes.

Q The media advertising exhibit which is RA&PX-90, I believe

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page C, refers to Swiss Style Yogurt, does it not, sir?

A I think so, but I would like to check it.

Q I refer you to RA&PX-90, page C.

A I am pretty sure that is Swiss, although it is taken out by the punching of the hole.

Q Now, sir, in view of the large difference in sales for Year to Date between 1968 and 1969, and the fact that a product named Swiss Style Yogurt did not appear on the May, 1969 price list of the Borden Company, wouldn't it be probable that Swiss Style Yogurt was also a new product?

A Well, I guess you are going to have to define your calendar date as to what is new. It was sold a year prior to the point we are talking about, and the previous years figure is October of that previous year. And from this document you have shown me we don't know just when the sales of the 60,000 units started.

Q Mr. Havemeyer, you seem to have missed my point. Yogurt is carried on previous price lists, but there is no reference to a product entitled "Swiss Style Yogurt". Now, we suddenly find a large jump in the sales of yogurt during the year 1969.

Now, I am asking you if it isn't probable this is due to the introduction of a new yogurt product which is termed Swiss Style Yogurt rather than Borden yogurt?

A No, I think it is a Borden yogurt and the carton would show the word Borden, Borden Swiss Style Yogurt.

Perhaps a parallel example is creamed cottage cheese. You will find on cottage cheese cartons, creamed cottage cheese but yet when you go to the price list you don't see the word "creamed" where there is a listing of prices for cottage cheese. It says, "Cottage Cheese Regular", but yet creamed cottage cheese is a variety of cottage cheese just as Swiss Style Yogurt is a style or variety of Borden yogurt.

Q But you don't know whether or not Borden sold a line of yogurt under the brand name Swiss Style in 1968 from your own knowledge, do you, sir, in the Chicago metropolitan area?

A We can't tell from this if it was either Borden yogurt or Swiss Style yogurt.

Q I am asking now from your own knowledge whether or not you know whether Borden had a product line on the market before 1969 under the title Swiss Style Yogurt in the Chicago metropolitan area?

A No, I don't.

Q Now, sir, isn't it true also that you have no personal knowledge of the nature and contents of the particular advertising involved in the so-called media advertising which is evidenced by RA&PX-90?

A I find that hard to answer because I don't remember all the testimony on that, but there was testimony concerning this media advertising. I think Mr. Daube testified on it.

Q I want your own personal knowledge now. Whatever

Mr. Daube said about this is in the record. You personally do not have personal knowledge of the nature and content of the advertising involved in the media advertising expenditures listed on RA&PX-90, do you,sir?

A May I see 90 again, please? The record shows there was newspaper advertising and television advertising.

Q Now, the content of that newspaper and television advertising,do you have any personal knowledge of the content, the materials that were in that newspaper and television advertising?

A You are going to have to be more specific before I can answer that.

Q Can you tell us what they said in the newspaper ads?

A No.

Q Could you tell us what they said in the television ads?

A No.

MR. MATHIAS: Your Honor, I have no further voir dire.

We would object to the acceptance in evidence of this document as having absolutely no probative value in light of the answers of the witness on voir dire.

MR. FALLS: May I have a moment, Your Honor, or maybe you would like to rule on that, but I would like to have a few moments to examine a couple of the records used in voir dire to determine if I might like to ask a few more that was planned and hoped for. Part of my job as management consultant is to not only counsel on the campaign itself, but to,with management, look at the affect. So, I have had this experience of measuring the affect of advertising.

JUDGE HINKES: You may continue, Mr. Falls.

MR. FALLS: Your Honor, I am about to turn to a somewhat different subject matter.

MR. MATHIAS: Your Honor, before he proceeds, Mr. Fall's questioning has raised on additional question about this exhibit I would like to clear it up on voir dire. May I?

JUDGE HINKES: The exhibit, of course, has already been received and voir dire would not be appropriate.

SURREBUTTAL DIRECT EXAMINATION (continued)

By Mr. Falls:

Q Mr. Havemeyer, are you familiar with Mr. Lemberg's testimony that it was improper to allocate Borden's driver's commissions on basis of time spent in making deliveries, but rather the commission should be allocated on a volume base, that testimony appearing on transcript pages 9404 and 9405?

A Yes.

Q Do you agree with Mr. Lemberg's view on that subject?

A No, I don't.

Q Would you explain why not?

A Well, the witness, Mr. Banaski, explained that the commission is part of the compensation package for drivers. That the commission is a mechanism for arriving at a pay level for drivers. I have also expressed that opinion myself in my own testimony regarding cost studies that we have submitted herein.

Secondly, time is a critical factor and a critical factor is a logical, permissible and a method which is used for allocation of costs. That is, if time of the driver is the critical factor in what can be delivered, then the expenses that are associated withthat driver would be allocated on that basis.

For example, the driver can only deliver, during the course of the day, what he can do in eight hours. If we can create some kind of a procedure, a contract, a mechanism, a tool that will save time, why then we save costs, so, time is a critical factor. Therefore, it is a logical and a principle which is used in commerce to allocate the expense associated with that time, and part of that expense is commission.

MR. MATHIAS: Your Honor, before the next question, I didn't want to interrupt Mr. Havemeyer, but I do want to object to his characterization of Mr. Banaski's testimony, in that he stated Mr. Banaski testified the commissions were a mechanism of paying a driver. This is a false characterization of the testimony and I would like my objection noted to that characterization.

JUDGE HINKES: The record will note your objection.

But, again, I accept this only as Mr. Havemeyer's impression of the testimony and not necessarily the fact of the issue.

MR. MATHIAS: All right.

By Mr. Falls:

Q Mr. Havemeyer, are you also familiar with Mr. Lemberg's testimony, that in an industry where the salesman or delivery man is essentially an order taker it is appropriate to allocate his compensation on a time basis?

MR. MATHIAS: Your Honor, I am going to object to that characterization of Mr. Lemberg's testimony in the question. It is an improper characterization of the testimony.

If Mr. Havemeyer wishes to give an opinion as to this particular item, that is quite all right, but I do not believe Mr. Lemberg's testimony should be twisted through the questioning of counsel.

MR. FALLS: I will rephrase the question to avoid any problem, Your Honor.

JUDGE HINKES: Very well.

By Mr. Falls:

Q Mr. Havemeyer, where a salesman or delivery man is essentially an order taker, is it your view that it is appropriate to allocate his compensation on a time basis?

A Yes.

Q How would you describe a function of a dairy route man in a store milk route in the Chicago area in the area we have been

Q But it extended from the mid-'50's to the mid-'60's?

A Yes.

MR.MATHIAS: What is meant by the mid-'60's, Your Honor?

JUDGE HINKES: Can you be more specific, Mr. Havemeyer?

THE WITNESS: 1955, 1956 and earlier.

By Mr. Falls:

Q Now, I think I asked the question, did you observe that these drivers for competing companies performed the same functions or did the act differently?

A I would like to go back to my experience again. I bring that up because Boman started to withdraw from the market. My experience in Chicago also went beyond just my Boman Dairy Company experience. For example, we made studies for manufacturers fo dairy packaging and in the course of that study, I studied the Chicago plant as well as other markets, so it is not just my association with Boman.

Q The question was whether drivers for different companies operated in this area acted in the same way or in different ways, generally, in the functions they performed?

A The same way.

Q Based on that experence, can you describe the function of a dairy route man in this market during that period of time?

A Yes. I can describe him as an order taker, not as a salesman, certainly not as the word commission would imply as being a salesman.

The consummation of the deal or arrangement with the store owner or store manager was based upon the quality of the products being available. It had to be a good quality product. It was based upon the breadth of the product line that the store manager or owner wanted.

For example, if he wanted to be assured of being able to serve Borden's milk and cheese and yogurt and other things, generally he would prefer to have a supplier who could serve him all of those products that he wanted , so the breadth of the line was important.

The capability of servicing the store at a time when the store manager wanted his store to be serviced. In the case of multiple store ownership, the capability of the route system to service all of the stores which were being considered for the deal. And, certainly price was a factor in selling to a store.

This was undertaken, the discussion of these factors, was undertaken between the store manager or the store owner and a salesman or solicitor, and not with the route driver.

So, once that deal had been consummated then the route driver went to the store and essentially was an order taker. He either received an order form the store manager saying what that manager wanted or he would look at the dairy case and see about how much was needed to fill the dairy case up and would go to the store manager and say, I think you need 90 quarts or 200 half pints of this,and the store manager would approve. So, it was essentially an order taker and not a salesman.

Q Mr. Havemeyer, are you familiar with any official publications which deal with the allocation of dairy route men's commissions on a time basis?

A Yes.

Q Can you identify any of those?

A Yes. I can identify studies used by and distributed by state milk control agencies. Specifically, studies which have been used by and distributed publically by state milk control agencies in Virginia and North Carolina and South Carolina.

MR. FALLS: I would like to have copies of those marked. Why don't we mark the one for Virginia as RA&PX-245-A, North Carolina as RA&PX-245-B, and South Carolina as RA&PX-245-C.

MR. MATHIAS: For the sake of order here, I believe that is going to present some problems. Just 245-A, B, C, without numbers of pages, page references and briefs, et cetera, are going to be rather difficult. The proper method of marking would be 245-A through Z and then the particular numbers.

MR. FALLS: I don't care,whatever is more convenient.

short one.

(A brief recess was taken.)

JUDGE HINKES: Mr. Falls.

By Mr. Falls:

Q Mr. Havemeyer, are you familiar with Mr. Lemberg's further testimony that he did not agree with your method of allocation of building expense because he felt this cost was not related to the time spent by the driver of the store, and also because in his view it related to other activities such as loading, storage of milk, clerical work and the like, referring to transcript page 9409; are you familiar with that?

A Yes.

Q Do you agree with Mr. Lemberg's observations on that subject?

A No, I do not.

Q Would you explain your disagreement and the basis for it?

A Yes. Again, the building and the associated costs are of a supportive nature. The principle purpose of having that building there is to support the sale and delivery of the products, and as explained inthe previous answer, for example, in the case of vehicles where I talked about supportive expenses for the same reasons expounded there.

The costs associated with the building are properly charged to the customers as a supportive expense and, therefore, chargeable to customers through the route man's time.

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Secondly, I would refer you again to the same studies that we introduced before, namely, RA&PX-245-A, B and C.

Q Why don't you just give the page references there, Mr. Havemeyer, rather than reading or quoting from them.

A Right. Page III-7, under the section subtitled "Methods for Determining Distribution Costs."

Q Of 245-A?

A That is correct, 245-A.

In 245-B, it is page III-5, under the section subtitled "Methods for Determining Transportation and Distribution Costs."

In 245-C, also page III-5, under the section subtitled "Methods for Determining Transportation and Distribution Costs."

Q Now, in spite of what you have said, is building expense sometimes allocated to the various subfunctions constituted in the building,as Mr. Lemberg suggested?

A Yes.

Q Why didn't you use that procedure here?

A Well, it is not generally thought to be the normal method of allocating such expenses in his analysis of dairy route distribution systems, and again, we are faced with a kind of problem that has been raised before, the detail that would be necessary to follow that approach is just not available. We would require a layout which not only showed the shape and size of the building, but how it was sectionalized among the subfunctions, which you enumerated, and that detail is not available to us.

As I already testified, I was not in that branch in O'Hare in 1956 and '66, or in Hammond in 1969, so I do not know how much of the space was associated with each of these sub-functions

Q In your judgment, Mr. Havemeyer, if it had been possible to allocate building expense to these various sub-functions, how would that have effected, in a general way at least, the ultimate cost differences between A&P and the other customers?

A They would have widened more in the favor of A&P.

Q What is the basis for your judgment on that?

A We now have to consider the sub-functions and how the building expense would be allocated to them. There were several sub-functions named.

First, there are some sub-functions which by virtue of the private label contract, I am talking about the sub-functions at the branch, had no association with A&P. They were sub-functions of selling, product waste, merchandizing and in the case of Hammond, a sub-function of credit. There was no such function associated with the A&P business for the private label deal.

Accordingly, any building space and associated building cost which would be associated to those functions,if that space could be identified, would not go to A&P at all, and would go against non-A&P store accounts.

Now, there are some sub-functions which were attributable

Q Do you recall Mr. Lemberg's first testimony at transcript page 9414 and 15, that had you broken the branch clerical costs down into each sub-function and then allocated the branch clerical costs as part of those sub-functions you would not have obtained any of the cost justification at least for some of the functions?

A Yes, I recall that.

Q In your judgment, Mr. Havemeyer, if you had made a precise determination of the expenses involved in each sub-function of the branch clerical expense, would the cost justification that you obtained have been greater or less than the one you obtained using the method which you in fact employed?

A The cost justification would have been greater than what we actually employed.

Q Why do you say that?

A There are some similarities here between what I am about to describe in the clerical function and what I have previously described in the other functions, for example, there is some clerical time associated with the selling function. So, if we then allocated that cost, clerical cost, to the selling function it would not go to A&P because there was no selling to A&P at the branch, it would all go to non-A&P accounts.

There would have been some clerical costs associated with the delivery function and, therefore, that cost or that portion of clerical costs associated with the delivery function would track on through and result in cost to specific customers in the same manner that we determine delivery costs. This created, since the delivery cost approach we used did, in fact, show that there was a cost advantage in delivering to A&P as compared to other customers, if we increased the numbers of dollars allocated in this way we would have increased the degree of cost justification.

The function of inventory control in clerical time associated with that and any cost associated with that probably would have been allocated to customers on the basis of truck loading inasmuch as inventory control is very much related to the whole loading function and recording of volume loading on to trucks.

As I have already indicated, that would be disclosed by our previous studies. There are some differences in truck loading costs between A&P and other accounts, so if more money had been allocated this way from the clerical group it would have widened that difference.

Now, he also talked about the maintenance of payroll records if there was time spent on that, that time would then be reallocated or I should say, first allocated to the functions in which the clerical sub-groupings worked.

For example, some of the maintenance costs of maintaining payroll records would have gone to the truck loading function and some to the sales function and some to the delivery function and so forth. However, with most of the personnel being loaders and delivery men more of that payroll record maintenance function would have gone to those sub-functions, and inturn, therefore, have created even wider cost justification than we had obtained.

There is also reference to a sub-function of vehicle maintenance and vehicle records. Again, any clerical time in associated costs relating to that would be charged to the vehicle costs and would have been charged,as I deem proper, through the delivery costs method. Therefore, any increase or any additional costs would be charged in that way would have widened the cost justification. So, I believe we overcharged A&P as compared to the more elaborate method as described through the sub-functional analysis.

Q Mr. Havemeyer, was your allocation of branch clerical expenses,the ones made in your study,based on the assumption that all customers receive the same type of clerical services? In other words, that a delivery was treated the same irrespective of to whom that delivery was made?

A That is right.

Q Were there, in fact, any branch clerical functions that were required to be performed for the non-A&P customers but not for A&P?

A Yes,there were several.

Q Would you describe those?

A There was a clerical function associated with the whole rebate system. There was no rebate function associated with A&P at the branch and, therefore, none of the clerical time associated with the rebate system would have been charged to A&P, but would have been charged to other customers.

Any clerical time involved in handling out-of-date merchandise would not have been charged to A&P, but would have been charged to the other accounts.

Any clerical time involved in collecting cash and accounting for cash and receiving checks and accounting for checks and comparing them against the bill would not have been charged against A&P inasmuch as there was centralized billing and receipt of checks.

Finally, any clerical time associated with the special deliveries would not have been charged against A&P inasmuch as A&P was not supposed to get special deliveries under the private label contract.

So, this clerical time associated, at least with those functions, would not have gone to A&P at all.

Q What would have been the effect if you had broken down the clerical time so as to make this distinction between the clerical functions associated with A&P and the clerical functions associated with the non-A&P stores?

A The effect of that would have been to charge less to A&P than we did,and charge more to the other stores.

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Q Again turning to a different subject matter, are you familiar with Mr. Lemberg's testimony at page 9419 and 9420 of the transcript criticizing the allocation of branch selling costs on a volume basis claiming it should have been charged on a time basis?

A Yes.

Q What is your opinion as to that criticism?

A In effect we did that. Maybe you recall that the net effect of branch selling expenses was to end up as a cost per point regardless of the size of the account or the size of the delivery.

That means then, the larger customers where a salesman would have spent more time would have been charged a higher total cost than smaller customers where a salesman would spend less time. Therefore, we would come out as we did, with the same cost per unit.

Q Did you have any basis on which to determine the actual time spent by salesmen with particular customers other than on the basis of the assumption that a large customer would require more time than a smaller customer?

A No.

Q There were no records to enable you to do that?

A No records.

Q Now, again turning to another subject matter. Are you familiar with Mr. Lemberg's testimony that account should have been taken of some expenses that in his view were incurred by Borden in serving A&P but not in serving the allegedly unfavorable customers, referring particularly to the time of Mr. Tarr, Mr. Malone and Mr. Gose; do you recall that?

A Yes.

Q Page 9420 of the transcript. In your analysis and study did you, in fact, take account of the costs associated with the time of Mr. Tarr, Mr. Malone and Mr. Gose?

A Yes, we did.

Q How did that happen, or how was that done?

A That is charged to stores onthe basis of a ratio. In the case of O'Hare it was 5.276 percent, which was added on to the aggregate of all other costs chargeable to the customers, and that would be found in the individual summary sheets which show the cost of dealing with an individual customer.

Namely, after we had determined funtional costs for truck loading and selling and advertising and so on and so forth, we aggregated those and then added 5.276 percent in the case of O'Hare, which was the mechanism for getting the expenses associated with those gentlemen to those accounts.

Q It might be helpful at this point to refer for just a moment to RA&PX-233 at page 6. Do you have one, Bob?

A Yes.

Q If I understood what you said, Mr. Havemeyer, you concluded from your study of the Borden records that the cost

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associated with these men were included in one or another of the accounts listed at page 6 of RA&PX-233, is that right?

A That is right.

Q Which account, at that time,do you think that was in?

A Account 020, Sales Overhead.

MR. MATHIAS: Your Honor, is this an assumption? If it is an assumption,then I don't believe it is permissible. We don't need any assumptions here on the record.

By Mr. Falls:

Q What was that based on?

A The analysis of the ledger cards for those accounts listed on page 6.

Q So,that whatever expense there was associated with Mr. Tarr, Mr. Malone, Mr. Gose, or anyone else in the category of sales overhead was distributed by the mechanism of this 5.276 percent you referred to?

A That is right.

Q And a part of that went to A&P and part to non-A&P stores?

A Yes.

Q Now, in your view, Mr. Havemeyer, would it have been proper to allocate some or all of these men's salaries directly to A&P?

A I am sorry, I didn't quite hear you.

Q In your opinion, would it have been proper to allocate some or all of these men's salaries directly to A&P or the

A&P business?

A Yes, but if we did we would then also have to make a similar analysis of those people who were not directly related to A&P and to those people whose activities were related to other types of business.

MR. MATHIAS: Your Honor, I am going to object and ask that last answer be stricken as having absolutely no foundation. There has been no showing that there were such people.

JUDGE HINKES: Let's have that developed,if it can be, before I have to make a ruling on that.

I think you will have to establish, Mr. Falls, the basis for the witness' response. Were there such expenses, how were they treated and so on.

By Mr. Falls:

Q Could you tell from the record what was the office with which these expenses were associated?

MR. MATHIAS: I object, Your Honor, no foundation.

MR. FALLS: We haven't gotten an answer.

MR. MATHIAS: There is no foundation for the question. There is no showing this witness knows anything about what went on in that office.

JUDGE HINKES: I think we will have to limit our inquiry with this witness to his examination of the record.

By Mr. Falls:

Q Let me generalize my question a little bit, Mr. Havemeyer. Let me ask you to refer to RA&PX-68, I believe it is. I am not sure of the exact title of the document, but it is identified and it defines certain of the accounts we are referring to, including Location 730. Could you get that in front of you?

A Yes, sir.

Q How is Account 730 described in that document?

A It is described as the Chicago main office.

Q Is that the location for the accounts which were utilized by you on page 6 of RA&PX-233?

A Yes, it is.

Q On the basis of your analyses of the records and their structure, do you know what areas were under the Chicago main office or what accounting subdivisions were under it or associated with it?

A Yes. It would be certainly the divisions or locations enumerated on this which, I think, is RA&PX-68, such as Irving Park, Holland Road, Milwaukee Avenue, Libertyville, Rockford, Elgin and so forth and so on.

Q All right now, let me put to you a hypothetical question, Mr. Havemeyer. If there were persons at the Chicago main office who performed services relating to non-A&P store business, and if there were persons there who also performed services relating to the A&P store business, would it be appropriate to allocate directly to A&P the expenses in that office associated with their business without also allocating to the other customers the expenses of that office associated with their business?

MR. MATHIAS: May I have that question read back, Your Honor, before the witness answers.

JUDGE HINKES: Yes.

(The pending question was read by the reporter.)

MR. MATHIAS: I have one objection. There is a non sequitur in that hypothetical. It is not posed that these persons are working exclussively on A&P or exclussively on other accounts. They can be working on A&P and also working on other accounts. The way the question has been posed, I believe it is defective.

JUDGE HINKES: Perhaps you want to make that a little clearer, Mr. Falls.

MR. FALLS: I am not sure it is confusing, but I will restate it in a effort to be as clear as I can.

By Mr. Falls:

Q Mr. Havemeyer, if there were persons at the Chicago main office who spent some or all of their time on the A&P business in the area we are talking about, and if there were also persons in that office who spent some or all of their time on the non-A&P store business, would it, in your opinion, be proper to allocate directly to A&P the expenses associated with people who handled their business without also allocating directly to the non-A&P store customers the expenses associated with the people who spent their time on that business?

A The answer would be, no, it would not be proper.

Q Were you able to determine from the record you had what amount of time or expense of the Chicago main office was devoted to non-A&P store business?

A No.

MR. MATHIAS: Objection, Your Honor. There has been no showing there was any such time yet.

JUDGE HINKES: I think the question nevertheless was answerable. Was this witness able to make any such separation?

MR. MATHIAS: I think the proper question is whether or not there was any showing of any such time, was he able to determine whether any existed.

JUDGE HINKES: I think that is implicit in the question, that is my point.

MR. MATHIAS: Well, in that light.

MR. FALLS: Would you like to have that question read back?

THE WITNESS: Yes, I want to make sure what I answer yes or no to.

(The pending question was read by the reporter.)

THE WITNESS: The answer is, no.

MR. FALLS: Maybe this is a good point to break, Your Honor.

MR. MATHIAS: Before we do, Your Honor, I would like to note complaint counsel still have an outstanding motion to strike which you reserved ruling on until the end of this questioning.

I believe the motion to strike should be granted now and that the later testimony did not support the statements that the witness made in assumptions concerning the split-up of time in the central headquarters.

MR. FALLS: I have forgotten now which question and answer that was.

JUDGE HINKES: You are referring now to the allocation of men such as Messrs. Gose, Tarr and Malone, is that right?

MR. MATHIAS: Right after the statement that early in this line of testimony he referred to Mr. Tarr, Mr. Gose and Mr. Malone and others, and how they were in his opinion allocated through his procedures. Then he put an answer in the record concerning the fact or his allegation there was a dichotomy of sorts in the central headquarters in which some people were working more or less exclusively on A&P and there were others working more or less exclussively on the other accounts.

I objected at that time and asked that it be stricken and you stated that you would allow them to continue this line of questioning to see if the background could be developed.

Now it is quite evident from the witness' last statement and since the document he reviewed did not give any information along this regard, that he could not make such a statement, and I ask my motion to strike be honored, sir.

MR. FALLS: I wonder whether over the lunch recess it would be possible to try to identify the exact question and answer to see whether, I must say, it faded a little in my mind, perhaps, Your Honor, has it more clearly in mind.

MR. MATHIAS: It might be best if the reporter could locate it for us and give us the exact answer. I did move to strike and there wasn't a firm ruling.

JUDGE HINKES: We, of course, can go back to the record if necessary and I don't think I need make my ruling until after the lunch break, so we will have an opportunity. But let me ask a couple of questions of Mr. Havemeyer along these lines and see whether I understand the situation.

Assuming Messrs. Gose, Tarr and Malone worked exclussively on A&P business, assuming further that others in the office worked exclussively on non-A&P business, would it be proper to allocate the expense of Messrs. Gose, Tarr and Malone exclussively and entirely to A&P?

THE WITNESS: Not without performing the other analysis, Your Honor.

JUDGE HINKES: The other analysis being to allocate the cost of all the others to the non-A&P, is that it?

THE WITNESS: Yes,sir.

JUDGE HINKES: Making the further assumption that these three men again did the same kind of specialized work, but that the others in the office had a mixture of functions, both A&P and non-A&P, under what circumstances would you deem it proper to allocate all of these three men's expenses to A&P alone?

THE WITNESS: I have to qualify my answer. I suppose it would depend upon what proportion of the other persons time were spent on A&P and non-A&P. To illustrate, if it would be demonstrated or tracked or proven that 99 percent of the other persons time were spent just on A&P, then it might be appropriate just to allocate Malone, Gose and Tarr just to A&P.

But, just to pick the opposite extreme, let's say one percent of the other persons time on A&P. It would not be proper to allocate Malone, Gose and Tarr just to A&P without undertaking the other analysis.

So, the general response in principle would be not to do it. Not to make the one allocation without making the other. But I would have to admit under certain circumstances it might be proper.

JUDGE HINKES: If you know that in any event the expenses of Messrs. Gose, Tarr and Malone were exclussively for A&P business and you didn't know what the efforts of the others in the office were, whether in whole, in part, or in not at all for non-A&P business, what would be your judgment as to the proper accounting approach?

THE WITNESS: Well,you would still have to make the analysis of both segments because you have a substantial amount of personnel related expense in these accounts.

JUDGE HINKES: And if you didn't make that analysis then what is your answer as to the proper accounting technique?

THE WITNESS: Well, the proper accounting technique, excuse me, I am getting confused.

JUDGES HINKES: If you just didn't know what the others in the office were doing, but you did know that these three men did all A&P work, what would the allocation of their expense be, in your opinion?

THE WITNESS: I would allocate all of the expense on some average basis, which is what we did.

JUDGE HINKES: All, that is the three as well as the rest of the office?

THE WITNESS: Yes.

MR. FALLS: Maybe I can illustrate it with one more question, Your Honor. I think you brought the point out quite well.

By Mr. Falls:

Q For example, Mr. havemeyer, let's suppose the record shows this Mr. Tarr spent 80 percent of his time on the A&P business and let us suppose it is the fact he spent the other 20 percent of his time on non-A&P store business. Would it be proper to allocate the 80 percent of his time to A&P without allocating the 20 percent to the non-A&P store business?

A No,it would not.

Q And I take it the same thing would be true if Mr. Malone spent 50 percent of his time on A&P and 50 percent of his time on non-A&P?

A That is right.

MR. FALLS: Okay, I am ready to break for lunch.

JUDGE HINKES: I think this puts in a little clearer focus what this witness is testifying about and we can explore further the admissibility of the testimony if you care to pursue it.

MR. MATHIAS: I would,if the reporter could locate that objection for me and the statement right before it, like that read back.

JUDGE HINKES: Very well, we will recess for lunch at this time. In view of the holiday season it might be advisable to take a little longer period for lunch, I am afraid. Let's say 1:45, if we can make it by that time.

is concerned it certainly was a saving associated with central billing, otherwise it would not have offered a two percent discount for that service.

Q Now, turning to the other items that Mr. Lemberg mentioned, why did you not charge A&P with some amount of extra expense which might have been attributable tothe segregation of private label products or to any additional manufacturing costs for private label products?

A First, we have testimony from Mr. Pergler that there was no additional cost in segregating the product between the two lines of products, two brands of products at the branch. It came to the branch in a segregated manner and it was maintained in a segregated manner and he said there was no extra cost involved. So, I did not have to associate any special and additional cost to A&P for that alleged segregation.

Now, let's go back tothe plant. The plant was a highly automated plant including palletizers, and the automated equipment associated with automatic lines.

When you have a large volume of a private label run, such as you had in the case of A&P account, why the private label product line is run through a machine and handled automatically right on to the point of casing it and stacking the cases and palletizing the cases on a pallet. So this handling of a large volume of private label run would be the same way that the packaging and handling of Borden label products would have been handled. That is, the Borden label products would go through the packaging lines in the same way right on to the pallet. There would be no difference in the cost and specially would there be no difference in the cost where there were multiple lines or packaging lines for the same size package.

The plant was large enough that it indeed had installed, for example, more than one line that could package paper half gallons and more than one line that could package gallons and more than one line that could package smaller package sizes.

That means then that Borden certainly had the capability and had the equipment there to run private label products on one line and the Borden label products for the same size package on another line. It was just not necessary to run those two product lines on the same machine.

Now, let's consider the possibility that they might have run the two product lines on the same machine. Any additional costs involved there would be very, very small on a unit basis minuscule.

Let's suppose for the moment that Borden label products in the paper half gallons are running through a machine and finally we have come to the end of a Borden label product line. All right, the only extra cost involved to now switch to the private label line is to take out of the sleeve of the packaging machine whatever few catron blanks may remain in the sleeve, take those out, put them aside, fill the sleeve with carton blanks for the private label product and push the button and go on bottling again. From that point on, it would be the cost of packaging the private label would be just the same as the cost of packaging the Borden label.

So, the only additional cost would be once per run would there be this extra cost of in the neighborhood of a few seconds , less than a minute, perhaps, to take out the remaining carton blanks and put in new carton blanks. If done on separate lines of the same kind of packaging machine, no additional cost whatsoever. If packaged on the same packaging line, a minuscule packaging cost.

Q Now, again, turning to another subject. Are you familiar with Mr. Lemberg's suggestion in his testimony at transcript pages 9465 and 9466 and 9475, that you prepared your cost studies in such a way as to maximize the cost differences between A&P and the new customers?

MR. MATHIAS: Your Honor, before the witness is allowed to testify, I would like to check those transcript pages.

JUDGE HINKES: Very well.

MR. MATHIAS: What were those page references again?

MR. FALLS: 9465 to 66 and 9475.

MR. MATHIAS: Your Honor, I am going to object to find a better source.

In general, long-range contracts are those that endure over several years, particularly if among buyers and sellers that account for, say, a reasonably large share of the market, tend to take on some of the aspects, really, of vertical mergers and at least introduces the possibility of foreclosure.

About all I can say on that point is: I would regard arrangements terminable at will not only because they are customary in the industry and, therefore, one would conclude this is just the way this industry runs, but it also avoids the possibility of foreclosure of A and P as a market, let us say, from other competitors of Borden.

In sum, long-range requirements contracts, to economists at least, tend to take on some possibilities of anticompetitive effects that contracts terminable at will just do not have.

Q In your experience, Dr. Markham, are terminable-at-will arrangements unusual with respect to products of this kind?

A From all I read in the record, all the testimony addressed to this point led me to the conclusion that this is quite normal. I don't believe I saw any testimony to the effect that any other sort of contract was usually encountered in this industry.

My own experience with the industry prior to my exposure to the record in this case would also lead me to that conclusion. In our own investigations, we did not encounter any situations where dairies had long-range contracts with retailers.

JUDGE HINKES: Off the record.

(Discussion off the record.)

JUDGE HINKES: On the record. A and P Exhibit Number 125 is received.

(The document referred to, heretofore marked for identification Respondent A and P's Exhibit 125, was received in evidence.)

By Mr. Falls:

Q Let me ask you, Dr. Markham, to look at Commission Exhibit 254. Let me ask you whether, in your opinion, the comparison set out on this exhibit demonstrates that A and P's retail price for this product was more stable than the prices charged in the Chicago market by others.

A No; you can't draw any conclusions on that point from these two price series because of the differences in methodology and coverage of the BLS series and that of the A and P prevailing price.

I could elaborate on that if you would care to have me do that.

Q Yes; would you please?

A The milk price shown here is the BLS price. That is the milk component of the Bureau of Labor Statistics' price index, which is done by a fairly comprehensive survey of actual prices

A February of 1965.

Q How was the private label priced out-of-store by A&P in the Dayton, Ohio, market?

A I priced the private label milk and dairy products in the Dayton, Ohio, market slightly lower than we had been selling the brand label.

Q On what basis did you set a slightly lower price for the private label milk and dairy products in the Dayton, Ohio, market?

A This was due to the fact that prior to the introduction of our private label there, we were being undersold by some of our competitors.

Q I don't follow what happened?

A I priced the milk to meet the competitive price on the market.

Q You priced the private label milk to meet your competitors' prices?

A Yes.

Q Why did A&P switch to private label milk in the Indianapolis, Indiana, Cincinnati, Ohio, and Dayton, Ohio markets?

A We switched to private label milk and dairy products to improve our gross margin.

Q Now, Mr. Miller, did you receive any guidance from higher headquarters about the question of the pricing of private

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already an exhibit in this case, is available for Your Honor to make those kinds of comparisons.

If there are specific parts of it that Mr. Mathias wants to refer to in argument, that is a different thing, but I think the purported attempt to quote the content of an exhibit back into the record, especially when it is this kind of handwritten exhibit, can only cause confusion and is not appropriate.

JUDGE HINKES: Well, of course, the document has not been received in evidence yet.

MR. SCHAEFER: I beg your pardon. Then on that basis I object to his reading from the document.

JUDGE HINKES: I think it might be preferable, Mr. Mathias, if you stated the nature of the information without quoting it.

MR. MATHIAS: All right.

JUDGE HINKES: And indicating why you think that is relevant to this proceeding. In other words, this document demonstrates the date when negotiations began.

MR. MATHIAS: All right, Your Honor. It is going to be impossible for me to go through this without characterizing.

MR. CURNIN: Your Honor, I didn't object only because I didn't think there was going to be a continuous reading of the document but I understood Your Honor's instruction to Counsel was to address himself to each document and to give one

I think very briefly that covers it.

Q Did you have any responsibilities or duties with reference to the A&P private label program at the O'Hare branch?

A Yes, I did.

Q What were your responsibilities and duties with reference to A&P's private label program?

A My duties and responsibilities were to rearrange our routes to a point where we could service A&P stores at the time they needed the service and demanded the service.

Q Were you responsible for the delivery to A&P of its product?

A Yes.

Q Did you have any responsibility for delivery and service to the other customers served by the Borden O'Hare branch?

A Yes, I did.

Q Now, did you have any responsibility with respect to the prices to be charged the non-A&P customers served by the O'Hare branch?

A Yes.

Q What was your responsibility to prices?

A Well, my responsibility there, of course, was to enforce the price list that we had from Borden, our published price list, and in cases where we had competitive problems we met competition at times.

Q You say you met competition. Do you mean by that that you departed from the Borden discount schedule?

A The regular discount schedule.

Q Did you do that under your own authority?

A Yes.

Q Will you describe the operation of the O'Hare branch and details of its delivery and pricing program?

A At the O'Hare branch -- would you repeat that question, sir?

Q Will you describe the method of operation of the O'Hare branch with particular emphasis on the details of the delivery program?

A As far as the delivery program is concerned, we, of course, had to make certain that our customers received regular and prompt deliveries as close to a schedule as we possibly could maintain and make adjustments in our delivery schedule as needed.

I am not sure I understood your question.

Q Perhaps I can ask you some more detailed questions.

Will you describe the physical layout of the O'Hare branch of the Borden Company?

A Yes. To begin with, we had a cooler, the approximate size being 135 feet by 50 or 60 feet in width, which had four entrances and exits to it, one in each direction, north, south, east and west, and the front part of the building we had reserve stalls for six trailers that came in with milk from our Woodstock plant.

All the milk was delivered to us on pallets. We used fork trucks to unload the trailers and put the milk in our cooler with exceptions being toward the end of the period when we were expecting trucks from Woodstock, we would unload the trailers directly into the route trucks.

Then when our loaders were loading the trucks, they would take the milk on pallets again from the cooler directly onto the trucks.

Q What type of routes were operated out of the O'Hare branch?

A Well, we had company-operated routes that we termed store routes and bulk routes, bulk being where they served restaurants, institutions and hotels, et cetera, that type of business on the bulk routes.

Then we also had independent vendors and distributors.

Q What is an independent vendor or distributor?

A An independent vendor is a man who operated his own truck, his own route, it was his own business. A distributor is another name for a vendor that had more than one route.

Q You say operated his own business. You mean he bought the milk from the Borden Company and sold it to whomever he could?

A That is correct.

Q Were there such sales known as counter-sales at the O'Hare branch?

A Yes, there was. Now explaining counter-sales, this is where someone came to our location to purchase milk. It could have been quart milk or in larger quantities, where they paid cash for it.

Now another type of counter-sale that we had was sales to the Navy, for instance, at Great Lakes. The Woodstock plant made the deliveries direct to Great Lakes Training Station via trailers, but they being a processing plant, they had no way of handling the sales of the product to Great Lakes. So we treated that as a so-called counter-sale.

Q That particular delivery from Woodstock to the Naval station would not have physically gone through the O'Hare branch?

A No, at no time.

Q Would you describe what a pallet is, Mr. Pergler?

A The best description I can give of a pallet, it is a wooden platform approximately four and a half by five feet in size, and about eight inches high with a supporting board in the center of it, allowing a fork truck to enter between the center board and the two sides and lift it up and carry it to whatever designation we wanted it.

Q I take it the cases of milk and milk products are stored on the pallet.

A Yes, that is the way we receive it from our Woodstock plant.

Q How many cases, if you know, are on a pallet?

A There were 30 cases with the exception of gallons of milk which were in glass, there would be 36 cases then.

By Mr. Foley:

Q From 1964 to 1968.

A It was served by store routes.

Q Now after the Tripp Avenue plant was closed down at the end of 1963 and the O'Hare branch was opened at the beginning of 1964, how many store routes did Borden Company operate out of the O'Hare branch?

A Twenty.

Q So it went from 26 to 20?

A Twenty.

Q Was there any further reduction after the beginning of the opening of the O'Hare branch?

A When we first moved to -- yes, we reduced it finally to 13.

Q Will you describe what happened and at what stages it went from 26 to 13 and, if you know, what were the reasons for the reduction in store routes?

A Number one, when we closed the Tripp Avenue plant we made a consolidation of some of our routes to reduce that number from 26 to 20. So when we moved into O'Hare we had 20 company store routes. After we went into the private label program with A&P it afforded us an opportunity to reduce the number from 20 to 13 by this private label program that we entered into with A&P.

Now prior to the private label program our men served we had what we termed the drop delivery. Our man just delivered the milk into the back room or their cooler. He did not stack the dairy case. As stated previously, they had to have the next day's order ready for our man so that he would know what their needs would be. They also had to have all the empty cases ready for him at the back door, stacked neatly enough for him to remove from their premises in an orderly fashion.

There were to be no special deliveries and also we were not taking out any outdated merchandise from the A&P stores. The only thing we ever gave them credit for were containers of product that was directly our fault.

Q Mr. Pergler, was there any practice under the private label program with reference to A&P's ordering of split cases or full cases of a product?

A Well, we insisted upon them ordering their major items such as quarts, half-gallons and gallons of milk and pints of half-and-half in full cases. The minor products such as quarts of chocolate, quarts of buttermilk, sour cream, that they could order in less than case quantities.

Q What did the A&P store manager, whoever it was, from A&P that gave the Borden order, on what kind of document did you give this order?

A It was what we termed a chainstore ticket. It was a delivery ticket as well as an order ticket. It served a dual purpose.

Q Was there a separate delivery ticket for private label purchases and for Borden label purchases to each of the A&P stores?

A No, this was one complete ticket. It had both private label and Borden product listed on it.

Q How did A&P and its stores comply with the terms and conditions of the private label program?

MR. MATHIAS: Your Honor, I am going to object unless there is some foundation laid for the question.

MR. FOLEY: I think the witness has testified he was the man responsible for the delivery system, he supervised the operation of the deliverymen, he was responsible for all the operations of the O'Hare Branch.

MR. MATHIAS: There has been no testimony he participated in any of the deliveries.

JUDGE HINKES: Perhaps your question should be limited to his instructions on delivery inasmuch as we have nothing to indicate that his instructions were followed. Perhaps they were different from his instruction.

By Mr. Foley:

Q Mr. Pergler, did you give instructions on delivery to the Borden drivers?

A Yes, I did.

Q What instructions did you give them?

A I outlined to them the terms of the private label program we had with A&P and I had asked them to report directly to me in the event that there was any lack of compliance on the part of A&P store personnel.

Q Did you receive reports from your drivers?

A Yes, I did and they were all very satisfactory. They had a hundred percent cooperation from the store personnel.

Q Now you previously mentioned the pallet system of delivery from Woodstock. Was this the same type of delivery system that was effected at Trip Avenue?

A No, it wasn't. At Trip Avenue we had the bottling plant in conjunction with the branch. Our type of loading there was manual. In other words, we loaded the trucks manually by dragging off of a platform into the truck five cases of milk at one time. This is the reason why we used as many men in loading and unloading at Trip Avenue versus what we used at O'Hare Branch. It was the manual operation versus the pallet-type operation.

Q Mr. Pergler, once again just to clear up a point, do counter sales include sales to Borden vendors?

A No.

Q Now were you familiar with the expenditures of Borden's O'Hare Branch?

A Yes.

Q And in particular were you familiar with the petty cash disbursement made out of the O'Hare Branch?

A Yes.

Q Can you tell us, Mr. Pergler, were any of the petty cash disbursements at the O'Hare Branch used for the service of A&P?

A No, they were not.

Q What type of service was being received by the non-A&P customers of Borden on the O'Hare Branch?

A Well, the non-A&P customers received what we would term a full service-type delivery. This entailed our man putting into the store the amount of merchandise he thought they would need. He stocked their dairy case. He would remove all outdated merchandise and give them credit and then he would collect, as a rule, cash daily on his deliveries.

Q Who would make out the order?

A Our man would make it out, sir. Our man did everything at the store. The storekeeper did nothing.

Q Would the Borden driver in delivering to the non-A&P customers make entry in his route book as to the quantity of product delivered?

A Yes, he would. Each day he would enter into the route book the amount of merchandise he had left and the amount of monies he had collected or the amount of monies that were charged that particular day.

Q Were route book entries to be made by Borden's drivers to the A&P stores?

A No, there was no need for that once we got into the private label.

Q Why was there no reason for ~~the ones~~ that once you got into the private label?

A For the simple reason that there was no money changed hands and the store tickets were computed at our Kilborne Avenue location.

Q What is the Kilborne Avenue location?

A That was our general office, district office.

Q So the drivers did not collect any payment from A&P stores?

A None whatever. The billing to A&P was done from our Kilborne location.

Q How did the Borden driver determine how much product to order for the non-A&P customers?

A I think largely it should be through experience, by serving the store for a length of time and then keeping a record in the route book of what he had been selling them, he would arrive at a given amount that should be in the store at all times, during the week as well as weekends. There was a buildup, in other words, on a weekend which would differ from that during the week.

His route book would indicate that in the event he had a day off or went on vacation or whatever the reason might be.

Q Could you give us an example, let us say, for how he would know how many cartons of half-gallons of homogenized milk to leave at Store X?

A No. 1, as I say, by serving the store for years he would get to know just about what to leave. Now during the week the needs of the average store would be less than what they would be on a weekend. So, he would mark in his route book the amount of merchandise that should be on hand during the weekdays, the amount of merchandise that should be left on hand on Saturdays. The Saturday order would be vastly different than during the week.

He would build up to this amount. In other words, if he determined that the store needed 100 half-gallons of milk on a Saturday and when he arrived there and they had, we will say, 20 left over from Friday, he would put in 80, built it up to the hundred that he indicated they would need.

Q How would he determine that there had been 20 left over from Friday?

A It would be in the dairy case. He would see it, he would count it.

Q Now were specials or promotions of products offered by the Borden Company to its customers?

A Yes, there were.

JUDGE HINKES: Before you go on, Mr. Foley, how did this buildup that you say the driver made for Saturday deliveries to non-A&P stores, how did that differ from his practice in the A&P stores?

THE WITNESS: The A&P store personnel gave our man the order as to what their needs would be.

JUDGE HINKES: Without his counting what was in the case?

THE WITNESS: He had nothing to do with it. That was their responsibility.

JUDGE HINKES: You may continue.

By Mr. Foley:

Q Did the A&P store manager or store personnel who gave your driver the order hand him the order ticket?

A Yes. They gave him the next day's order the day that he was making that day's delivery. In other words, if he was makin

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By Mr. Foley:

Q When was it that you enjoyed this authority, Mr. Pergler, to vary the discounts?

A We are talking about the O'Hare branch. From 1963 to the time of my retirement.

Q During your entire tenure there?

A Right.

Q Now I direct your attention to Floom Bros., Mr. Pergler. I ask you whether Floom Bros. received the published discount or whether it received some other discount.

A They received some other discounts, sir.

Q What discount was that?

A They were members of Consolidated Foods. They would receive at least two percent more than what they would earn.

Q When you say "greater than what they would earn," you mean greater than what they would earn under the published discount schedule?

A Yes, sir.

Q Directing your attention to Greenview Fruit, are you aware of what discount Greenview received?

A Yes, they would also receive more discount than what they would earn. They were also a member of Consolidated.

Q Now with reference to this one other customer for whom no discount was given, and that is Madison La Veigne, at the top of the second page, 183B, do you know what discount Madison

La Veigne received?

A   Yes, they received more than what they would actually earn on their own.

Q   Did Borden sell its dairy products to its customers in Chicago out of the O'Hare branch in accord with the published discount schedule in February and March 1966, Mr. Pergler?

A   Would you repeat that question again, sir?

Q   Did Borden sell its milk and dairy products to its non-A&P customers in Chicago out of the O'Hare branch in accordance with its published discount schedule?

A   Yes.

Q   You have just given us three or four cases where the Borden Company granted a higher discount rebate.

A   Yes.

Q   Were there any other customers who received higher discounts?

A   Yes, that are not on this list.

Q   Even on the customers on this list --

MR. MATHIAS: Your Honor, is Mr. Foley trying now to impeach his own witness?

MR. FOLEY: I am not.

JUDGE HINKES: Well, in any event, I will let you continue, Mr. Foley.

By Mr. Foley:

Q   Previously, Mr. Pergler, you made reference to your authori to change the discount schedule for customers. When did you have occasion to do that?

A Well, I changed them at times when we had a competitive situation where some of our competitors went into our customers and offered greater discount. In order to retain the business, I met the offer that was made to them.

Q Did this happen very often in 1966?

A It was quite frequent, I would say. In all cases, however, we did not give any additional discounts.

Q Only sometimes you gave additional discounts.

A Only sometimes.

Q How did you know that your competitors were offering higher discounts than you were?

A Usually our store keepers would notify us that they had been there and what they had been offered and told us if we wanted to maintain the business, we would have to meet it or come as close to it as possible.

Q Now, Mr. Pergler, once again directing your attention to Commission Exhibit 183 and calling your attention to Bill's Market -- Bill's Market appears on 193A at the location of 6649 North Clark Street -- it is near the bottom of the page -- do you see that?

A I see it.

Q There is a second address for Bill's Market which does not appear until 183D, the last page of the document. It is on the

MR. FOLEY: I recall on Mr. Mathias' objection Your Honor previously ruled we were not to pursue the question after Your Honor ruled on it.

JUDGE HINKES: This is a new objection. I will overrule the objection in any event. I think it is the type of hearsay which could be allowed in this proceeding.

You may answer what did you learn.

THE WITNESS: I learned there was deviation on the part of other dairies from the published lists and discount lists.

By Mr. Foley:

Q How common a practice was this?

A It was quite common in the market. It was quite common in the market, to answer your question.

MR. FOLEY: I have no other questions.

JUDGE HINKES: Do you have any questions, Mr. Schaefer?

MR. SCHAEFER: No, Your Honor. This whole subject, as I understand, relates to counts 1 and 2, so we have no questions.

JUDGE HINKES: Very well. You may cross-examine.

MR. MATHIAS: Your Honor, could we have a five-minute recess to put our notes together?

JUDGE HINKES: Very well, we will take a short recess now.

XXXX (Whereupon, a brief recess was taken.)

JUDGE HINKES: Mr. Mathias, you may cross-examine.

specified.

Q During the time Mr. ~~Goes~~ Gose was there would Mr. Hedin or Mr. Sorensen report to him?

A Yes, sir.

Q Now, Mr. Pergler, you stated that you gave instructions to the route men in the O'Hare Branch in connection with the A&P private label program. Were those written instructions, sir?

A They were verbal.

Q And the reports which you received back from the route men, were these in written or verbal form?

A Verbal form.

Q Mr. Pergler, you were asked a number of questions concerning counter sales. I think you defined them approximately as sales to someone who came to the O'Hare Branch location to purchase milk; is that correct, sir?

A That is part of it, yes.

Q You also mentioned sales to the Navy, at the Great Lakes Station?

A That is correct, sir.

Q What proportion of your counter sales were accounted for by the sales to the Navy at Great Lakes?

A About 99.5 percent, or 99.8 percent, sir. The counter sales to people coming to the location to purchase milk were just about nil.

Q Would that be someone who just came off the street?

A That is correct, sir.

Q Now in loading the route man's truck were there ever mixed pallets of A&P and Borden label products?

A Yes, that would happen on occasions.

Q Was this again in order to avoid dead space in a truck?

A Yes, sir, particularly on the weekends when the order was considerably larger than the first part of the week.

Q Now when this became necessary, were these mixed pallets furnished to you from Woodstock or did your loading personnel at O'Hare have to mix the pallets?

A Our loading personnel would have to mix the pallets.

Q When a loader was loading a route man's truck, if he had to load, say, four pallets of A&P label product and four pallets of Borden label product, he would have to go to two different locations within your cooler room to obtain these products?

A They would be adjacent to each other. We tried to keep all the half-gallons in a particular area, gallons in another area.

Q These were segregated as to product as well as label?

A Size of contain and label, yes, sir.

Q So that the gallon cartons of A&P label milk would be segregated from the Borden label gallon cartons, but they would be in adjacent positions?

A Yes, they would be next to each other in the cooler.

Q In order to get the product mix that was desired on the truck, then the loader would have to drive his fork truck to the various portions of the cooler room and pick up a pallet of gallons here, a pallet of A&P gallons here, a pallet of quarts over in the other spot?

A Yes. We couldn't have it all in one particular place. We had to have it segregated. So that no wrong impressions are left, to illustrate, if he had a half-pallet of A&P label half-gallons, he would fill the other half of the pallet with Borden label half-gallons. But he would not have to drive any distance. He would put the A&P on here and right next to it was the Borden. All he did was drag it off from one pallet onto the one he was loading.

Q He would have to do it by hand?

A By hand, yes, sir.

Q In the case of the major items I believe you stated, like the gallons, half-gallons and quarts, these all came from Woodstock in full pallets of one label; is that correct?

A Yes.

Q Now comparing your Trip Avenue operation with that of your O'Hare Branch, the big change between Trip and O'Hare Branch was the fact that all of your products were palletized as compared to previously where everything was handled by hand, is that correct?

A That's right, sir.

Q This change really occurred about January 1974, is that h-1

Q Now, Mr. Pergler, when the route man was instructing the loaders on where to put the various products and pallets in his truck, he did this for his convenience in serving his entire route, did he not, sir?

A Yes, sir.

Q Was it very usual, Mr. Pergler, in connection with the palletization, as these pallets were put on the truck for a route man to have a full pallet of just quart items?

MR. FOLEY: Your Honor, I would object unless there is a clear description of the phrase "very unusual". The question is imprecise.

JUDGE HINKES: Can you rephrase that, Mr. Mathias?

By Mr. Mathias:

Q Was this the usual case, Mr. Pergler?

A Would you repeat the question, sir?

Q Mr. Pergler, wouldn't it be true that quarts of milk did not sell in the same volume as the gallons and half gallon unit?

A That is correct, they did not sell in the same volume.

Q Wasn't it quite common that in the case of the quart units of milk that the pallets had to be mixed pallets?

A Yes.

MR. FOLEY: I object to "quite common."

JUDGE HINKES: I will allow that.

MR. MATHIAS: The witness answered yes.

referring to as a rare occasion. Perhaps that will narrow it to some extent.

By Mr. Mathias:

Q Would the incidence of mixed pallets of gallon and half gallon units be more than a rare occasion on your route trucks, Mr. Pergler?

A It would not be more than a rare occasion, no, sir.

JUDGE HINKES: Was that any different from your experience with the quarts?

THE WITNESS: That was different than our experience with quarts, yes, sir. You see, what we attempted to do, we tried to get our men to order full pallets of product wherever possible.

By Mr. Mathias:

Q Mr. Pergler, I would like to show you some entries in a route book marked W11, February '66 and note that this is in the rear of the book and there are references here to cases of gallons, paper, private, cases of half gallons, private, private label. I take it at this period of time this would refer to A&P label product, would it not, sir?

A Yes, it would.

Q It appears to me that these are the route man's entries as to the number of cases of these products loaded on his truck on a particular date; is that correct?

A Yes.

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Q Looking down those columns it would appear that in the case of this particular driver in this month that on no date did he have a full pallet of private label gallons, paper, or private label half gallons paper; is that correct, sir?

A You are misreading this. The gallons of paper private label are in this column here.

Q That is the cases over here, is it not, sir?

A Yes, sir. That is the gallons of glass here.

Q There are cases on gallons, glass. I believe these are the cases and number of units within the cases. There would be six gallons in a case; is that correct, sir?

A Right.

Q So this would be seven cases with 42 gallons, is that correct, sir?

A Right.

Q So that this would be the number of cases loaded on the truck each day; is that right?

A Yes.

Q In the case of this driver in this month it would appear that he never had a full pallet of gallon, paper, private label or half gallon, paper, private label; is that correct, sir?

A Yes. This is what month?

Q This is February 1966.

A May I add one thing? Now there was a time when we first started this private label program with A&P when we were allowed to put in both Borden label as well as A&P label. Later on that order was changed and we were not permitted to put in any Borden label products.

So that at times you will find a variance in the order where for convenience or other reasons the store clerk, the dairy clerk or store manager would be ordered more Borden product than he would A&P. That accounts for the small quantities of private label there.

Q But at this time and in this month this driver did not --

A That is true.

Q He would not have been carrying full pallets of private label.

A Not at that particular time.

MR. FOLEY: Mr. Mathias, may I see this book?

MR. FALLS: May we have a moment to look at this before you go on, John?

MR. MATHIAS: Certainly.

MR. FALLS: Rather than waste the court's time, we might allow Mr. Mathias to go ahead with the cross examination. We will study this a while before redirect.

JUDGE HINKES: Very well.

By Mr. Mathias:

Q I hand you another route book marked "W18" for February 1966. I call your attention to similar entries in the rear of this book, in which certain case lots are mentioned.

manager's office?

A In the manger's office.

Q Did the driver have to go to the manager's office?

A No. Usually the dairy clerk did the checking in and the dairy clerk would go to the store manager's office to have it stamped.

Q Then the tickets would be stamped and one would be returned to the driver before he left?

A Two of them would be returned to us, one they would retain. They would retain the original.

Q That would be returned to the driver before he left the store?

A Yes, sir, after it was checked.

Q Now, Mr. Pergler, in connection with four customers that appeared on an Exhibit CX-183 that was shown to you: Misicka, Floom Bros., Greenview Fruit, and Madison LaVeigne, you testified that each of these customers received a discount somewhat more than your published discount schedule.

Now, in connection with Floom Brothers in particular you mentioned that this was a member of Consolidated Foods and that they received two percent more than the earhed amount. Is that correct, sir?

A Yes.

Q Now, there has been some testimony on the record by prior Borden witnesses that in addition to the published discounts

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appearing in the published discount schedules of Borden that there is also a two percent discount available for central billing to groups. Is this correct, sir?

A That is correct.

Q Is this the two percent to which you referred in connection with Floom Brothers?

A Yes, sir.

Q Would this be the additional discount also mentioned in connection with the other three, Misicka, Greenview --

A No, Misicka was different.

Q Was Misicka a member of any group?

A Consolidated.

Q He was a member of the Consolidated group?

A Yes.

Q Did he receive two percent for central billing?

A Yes, sir.

Q What about Greenview Fruit, were they a member of Consolidated?

A I am a little hazy whether it was Consolidated or ~~Grossman~~ Grocerland. In all probability it was Consolidated.

Q They were a member of a buying group?

A Yes, either ~~Grossman~~ Grocerland or Consolidated.

Q They would receive two percent discount for central billing as well?

A Yes, sir.

Q In the case of Madison LaVeigne, was this store a member or any cooperative group?

A YEs.

Q What cooperative group, if you can recall?

A I think it was Consolidated.

Q Would they also have received a 2 percent additional discount for central billing?

A Yes, sir.

Q Now, you say that Misicka was different from Floom Brothers. What did you mean by that, sir?

A We had a competitive situation there where some competitor went in there and offered him a larger discount. In order to retain the business we had to meet that discount.

Q In the case of Greenview Fruit, what was the circumstance there? Was it a competitive discount as well, or was that the 2 percent central billing?

A To the best of my recollection, he got the two percent central billing.

Q And Madison LaVeigne?

A That likewise was the same situation.

Q The 2 percent additional?

A To the best of my recollection, sir.

Q Now, Mr. Pergler, you were asked some questions about the published prices and discount schedules of Borden's competitors. You stated that you were aware that some of your major competitors, such as Bowman, Dean and Wanzer, and you may have mentioned some others, did have some published schedules. You were also asked if these competitors adhered to the published schedules.

Did you learn from your customers that there was deviation from these published schedules?

A Yes, sir.

Q Now, Mr. Pergler, you would only be likely to hear of any deviations from the schedules, is that not correct?

A Yes.

Q In other words, your customers would not be calling it to your attention when they were only offered the regular published list price plus published discount schedule, is that correct, sir?

A Well, they would let us know that our competitors had been in there making a solicitation even though it might have been at their published discount prices.

Q Unless those published prices varied quite differently from Borden they would not call them to your attention, sir?

A No.

Q Were there some occasions when a competitor would come out with a new discount schedule which appeared to offer a little better price than Borden and this was called to your attention?

A Yes, sir. I may be leaving a wrong impression here in it was Borden's policy to attempt to be paid from its customers in accordance with its published price lists and published discount schedules, and I believe you testified that it was. Is that correct?

A That is correct.

Q How successful were you in 1966 on the O'Hare route in getting paid from the customers in accordance with the published discount schedule and published price list?

A To the best of my recollection I would say with the exceptions of those cases where competitors had been in offering inducements we were quite successful.

Q Of the customers listed on CX-183, for example, if you will look athat over, do you have any idea how many of them received only that to which they were entitled under the published discount with the possible two percent extra if they were getting the central billing feature?

A I think all of them except two would receive something additional.

Q All of these customers would receive something additonal?

A Right.

JUDGE HINKES: That is additional beyond the two percent for central billing?

THE WITNESS: Beyond our published discount price.

JUDGE HINKES: The question combined both, your published discounts and the two percent central billing. Did they get more than that?

THE WITNESS: Yes.

JUDGE HINKES: All of them?

THE WITNESS: All except two to the best of my recollection, sir.

By Mr. Foley:

Q Was this in response to competitive conditions?

A Yes, sir.

MR. FOLEY: May I see W-13, Mr. Mathias?

Do you have W-13 for March? I guess that is it.

By Mr. Foley:

Q Mr. Pergler, directing your attention to Route Book W-13 for March 1966 and the pink slip in the front of that book entitled "Office charges for special orders," are you familiar with that form, sir?

A Yes.

Q What is that special order form used for?

A This is for a special delivery to a customer.

Q When you see this slip here does this indicate to you that the A&P Store identified there at 1227 Harlan Avenue received a special delivery on that date?

A Yes, sir.

Q Would you have any explanation as to why that should have taken place under the private label program?

A Yes. So I may clarify some misunderstanding here, I want to say when the program went into effect, gen4tlemen, we conscientiously tried to enforce all the terms of the agreement between A&P and the Borden Company relative to the private label program. However, to break a habit of years standing with some of the men took time and patience to correct. Eventually we corrected all these inequalities, so to speak, where the men were keeping records in the book where they weren't supposed to. They had to be constantly corrected in that respect. The same with specials.

Now, the special deliveries came about in two ways. This we corrected almost instantly. It is quite possible that our man was shorted on his load by the loaders, where he did not get his full load. It is possible that our man made an error in computing the order for the day on particularly the Borden label product which in this case indicates that he had a special for Borden. Or when our man was serving some of the independent stores prior to getting to A &P he had received orders from the independent stores which were in excess of what he anticipated the needs would be. So as a result, when he got to the A&P Store he found he was short of merchandise and asked that special delivery be made.

JUDGE HINKES: You say all this is possible, but do you kno know what happened here?

THE WITNESS: Sir, on this particular case, no.

JUDGE HINKES: Very well, you may go on, Mr. Foley.

standpoint of production of various dairy items such as ice cream, milk, cream cheese and so forth.

Q And during the course of which did you become familiar with costs involved in connection with the production of milk and dairy products?

A Yes.

Q How long did you hold this position, sir?

A Until June of 1971 when I was brought into the corporate office in New York.

Q And what position were you assigned at that time?

A As national buyer of all dairy products.

Q How long have you held that position?

A Since June of 1971 to the present time.

Q To date?

A Right.

Q Do your duties and responsibilities include negotiating with dairies throughout the country for quotes as to potential suppliers of milk and dairy products to various units and divisions of the company?

MR. MATHIAS: Your Honor, I object unless a time period is stated.

MR. CURNIN: This, Your Honor --

By Mr. Curnin:

Q Well, would you tell us for what time period you have held that responsibility?

A Since September of 1973.

Q And at that time was the procedure within the company changed so that you as national buyer of dairy products, the negotiations with the dairies was then transferred from the unit or division level to yourself in headquarters?

A That is right.

MR. CURNIN: I ask the reporter to mark this document as Respondent A&P Exhibit 137.

MR. MATHIAS: That is a two page exhibit.

MR. CURNIN: Yes.

JUDGE HINKES: Make that A and B.

MR. CURNIN: Yes, Your Honor.

(The document referred to was marked Respondent A&P Exhibit 137-A and -B for identification.)

By Mr. Curnin:

Q Mr. Pilgrim, I show you a document that has been marked Respondent A&P Exhibit 137-A and -B which is entitled "Comparison of Private Label Prices Quoted A&P to the 2-2-2 Pricing Formula, 1964-1965." It is a two page document. Did you at our direction prepare this document?

A Yes, I did.

Q Would you tell us what this document shows, sir?

A It shows the comparison of the 2-2-2 formulation as against the actual prices that were quoted to A&P.

Q Now would you identify for us the dairy quotes that are

P R O C E E D I N G S

JUDGE HINKES: If we are ready, then, you may call your witness, Mr. Curnin.

MR. CURNIN: A&P calls as its next witness, your Honor, Charles C. Tise.

CHARLES C. TISE was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Curnin:

Q Will you give us your home address, Mr. Tise?

A 4271 Chaucer Lane, Columbus, Ohio.

Q Are you presently employed by the Borden Company?

A Yes, I am.

Q And in what capacity?

A I am the Division Director, Production and Engineering, for the Dairy and Services, Northern Division.

Q How long have you held that position?

A Since November -- or since July 1, 1970.

Q And you are the Director of Production and Engineering for the Northern Division of the company.

What geographical area is covered within the Northern Division?

A This geographical area is, if we take the line between Kentucky and Tennessee and extend it from the East Coast to the West Coast, everything north of that line in dairy and services is the Northern Division.

Q And would be within your jurisdiction insofar as production and engineering is concerned?

A Yes, it is.

Q Will you describe for us just what your duties are as Director of Production and Engineering?

A We have 26 processing plants, milk and ice cream, in this area. My responsibility is the -- every phase of production and engineering with those production plants and their distribution branches.

Q Would that include, when you talk about production and distribution, overall responsibility for the handling of the milk through the stages of pasteurization, homogenization, fortification, quality control and the like from farm to consumer?

A My responsibility really covers the raw milk from the time it arrives at the plant, the entire processing procedure, throughout that processing plant, the packaging and generally the loading of the product onto the transport or route vehicles the first time.

Q Are you a college graduate, Mr. Tise?

A Yes, I am. I have a BA in agriculture from the University of Missouri. My major course of study was dairy manufacturing.

Q When did you graduate from the University of Missouri?

A In 1947.

Q What did you do at that time, sir?

A My employment started with Borden in St. Louis, Missouri, in 1947. I became the Assistant Director of Production in St. Louis, Missouri, ice cream plant, responsible for basically quality control, processing procedures, training of people, so forth, in that plant.

Q Did you become familiar in St. Louis with the -- when you say the processing of the product, just what would be involved?

A Well, this was an ice cream plant rather than a milk plant. I was responsible for all of the incoming raw product so far as quality. Then once the product was received, it was my responsibility to follow processing procedures, equipment, training of people, until the finished product was in the hardening room and ready for load-up.

Q How long were you in the St. Louis area?

A I was there two years.

Q So that would take us into 1949?

A Yes, sir. At that time I went to Huntington, West Virginia. This was really in late '48. I went to Huntington, West Virginia, as the plant superintendent of a combination milk and ice cream plant. This was a plant that processed both fluid milk, extra products, and manufactured ice cream, full line of products and ice cream.

Q When you talk about extra products, are you talking about byproducts such as skim milk and buttermilk and products of that general category?

A Yes, cottage cheese, buttermilk, skim milk, cream, chocolate milk.

Q In connection with the milk processing aspect of your duties at the plant in West Virginia, did you similarly become familiar with all the steps involved in the processing, pasteurization and homogenization of fluid milk?

A Yes, I did. I had the complete responsibility for receiving of raw milk, the processing, treating of people, maintenance of equipment, the flow of product through the plant, everything that could be connected with a fluid milk processing plant and an ice cream processing.

Q Did you have anything to do with the selection, layout, or design of the equipment which was being used in connection with the processing of raw milk?

A Yes, I did.

Q Would you tell us a little something about that?

A In any equipment change that we deemed necessary through study, it was my responsibility to make recommendations to my superior, the manager of the company, or the manager of that particular plant This involved processing procedures, processing equipment, the hiring and training of people, any building changes, so forth.

Q How long did you hold this position at the plant in West Virginia, sir?

A I was there until the first of October 1950.

Q What happened at that time?

A The first of October 1950, I was transferred, was promoted transferred to the Borden Midwest District Office in Columbus, Ohio, and I became the Assistant Director of Production at that time.

Q You say this was for the Midwest District, or the Midwest Division?

A This was the Midwest District.

Q And what geographic area was encompassed in the Midwest District?

A The Midwest District was composed of the, well, the eastern boundary was Pittsburgh, Pennsylvania, so it encompassed western Pennsylvania, Ohio, West Virginia, Kentucky, almost all of the State of Indiana, and Michigan.

Q And --

A In addition to that, the State of Missouri.

Q Were you basically in charge of processing plants within that geographic area as you have described it to us?

A I had one superior that I was responsible to. He was the Director of Production. I was responsible to him for the --

Q How many processing plants did you have, if you can recall, approximately, within this geographic area?

A I can't remember exactly. This was in the early '50s, before we started consolidating plants. I would say approximately 35 milk and ice cream plants at that time.

Q And as Assistant Director of Production, would you tell us what your duties encompassed in connection with those plants?

A My duties, my responsibilities were to work with each individual processing plant and the management and the personnel at each plant on all phases of production. I participated -- I designed changes in processing plants. I designed some new processing plants. In doing so, I started with the planning of a new facility, the specifications for the equipment, was on the scene while the building was under construction, wrote specifications for equipment, was on the scene when the equipment was installed, stayed to train the people to operate the plant until it was fully on stream.

Q Where was this plant located, sir?

A I did one in Madison Heights, Michigan; one in Dayton, Ohio; one in Lexington, Kentucky. They were all new plants. There were numerous plant modifications during this time.

Q Were these plants for the purpose of handling and pasteurizing raw milk as a milk and ice cream plant and by-product plant or just what?

A Those three plants that I mentioned were all for the purpose of handling milk and milk products. No ice cream in those three that I mentioned specifically.

Q How long did you hold this position, sir?

A Until November the first, 1968.

Q What occurred at that time in November of '68?

A At that time I was made the Vice President of the Midwestern District in charge of Production and Engineering.

Q Was the geographical area covered by the Midwestern District in '68 basically the same as you described to us during the period 1950 to '68?

A No. It was larger. It covered a much larger geographical area because in 1966 the Midwestern District was combined with the Chicago Central District. And so the Midwestern District encompassed the old Midwest plus the Chicago area, Milwaukee, the northern portion of Indiana and Iowa and Illinois.

Q What were your duties and responsibilities as Vice President of Production and Engineering for the Middle Western District?

A Well, they were basically the same as when I was the Assistant Director in Midwest. The duties were the same, the same as when I was Assistant Director in the Midwest District.

Q Would it be correct to say, however, that there were more processing plants now within your jurisdiction?

A Yes, there were. I did not work in those Chicago central plants, with the exception of Rock Island, Illinois.

Q How long did you hold the position of Vice President, Production and Engineering, of the Middle Western District?

A Until November 1 -- I am sorry, July 1, 1970.

Q And I think you have already testified that is when you became the Division Director of Production and Engineering for the Northern Division?

A For the Northern Division; yes, sir.

Q At that time did the Borden plant at Woodstock, Illinois, come within your jurisdiction?

A Yes, it did.

Q Did you determine at that time if the equipment which was then being used for the processing and handling of raw milk was the same equipment that had been in the plant during the period '65 to '70?

A Yes.

Q And did you determine at that time that basically the same process was being used for pasteurization and homogenization of fluid milk and byproducts?

A Yes, basically the same processing procedures and processing equipment. There could have been minor changes in temperature. There could have been minor changes in the amount of solids, not fat, added, to some of the extra products.

Q I am going to ask you a series of questions, Mr. Tise, so that you can explain to those present just what occurs in the processing, pasteurization, homogenization, addition of Vitamin D, to come up with homogenized Vitamin D milk. Then I am going to pass on to some of the byproducts --

A Okay.

Q -- that were manufactured, processed by the Borden plant at Woodstock. I, myself, don't have a technical background and certainly not a technical background in the dairy industry so that I will ask that you give us as complete a description as you can so that we can fully understand the process that is involved here.

A Okay.

Q I would like to start with the procedure that was involved at Woodstock for bringing the milk from the farms to the collection point, wherever it was, and the procedure that is involved in bringing that milk into the plant.

MR. MATHIAS: Your Honor, I am going to object to this whole line of questioning beginning with this question on the grounds that there has been testimony as to this general procedure from Mr. Minkler at the time he appeared, and on the grounds of relevance. I see no relevancy to any of the issues in this case as to this line of questioning with the present witness. We have had the president of the division on the stand, the president at the time that we were concerned with in this matter. And he has testified

JUDGE HINKES: I think that under the circumstances I have no alternative but to permit this inquiry to go on, and to await the assistance of counsel on the legal issues that are presented.

You may continue, Mr. Curnin.

MR. CURNIN: May I have the last question read back, your Honor?

JUDGE HINKES: You may continue if you can, Mr. Curnin.

By Mr. Curnin:

Q Will you tell us, Mr. Tise, the procedures that were followed in the transportation of raw milk from the farm or the holding station, whatever it be, into the Woodstock Plant, Borden's Woodstock Plant in Illinois?

A The milk is hauled to the Woodstock Plant in large stainless steel over-the-road tankers. These tankers, tank trucks, may be owned by contract haulers. They may be owned by the farmers' cooperative. They may be individually owned. The delivering tank may have picked the milk up at each individual farm, or it may be a load of milk that was pumped over at another station from a tank truck or other trucks into the delivering tanker. It arrives at Woodstock, and prior to unloading it goes through a series of quality checks that consist of odor, temperature, acidity, and in some cases, flavor.

Q You say it goes through an acidity test. Just what is involved there, and what is the purpose of such a test?

A This is to determine the titratable acidity of the milk, raw milk. This is a test that is commonly used throughout the dairy industry to determine the growth of a certain type of bacteria that convert lactose in milk to acidity.

Q And for what purpose or purposes are these tests undertaken when the raw milk is delivered to the plant?

A Well, those are the quality checks that we normally put on milk. This is the first chance that the plant has to start their -- to start a quality control program on the milk.

MR. MATHIAS: Your Honor, I would like to object in this instance, unless the witness is testifying as to what happened in Woodstock. It is not clear from the nature of his answer whether this is a general experience as to the way this milk was collected at the various plants of Borden within his jurisdiction, or whether this is an observation of what occurred at Woodstock in the time period in which we are concerned here, which is 1965 through 1967 -- I mean 1970.

MR. CURNIN: Your Honor, I prefaced my question here with what occurred at the Borden processing plant in Woodstock, Illinois. And we are talking about the handling of milk at Woodstock, Illinois.

JUDGE HINKES: During that time period?

3138 MR. CURNIN: During the period '65 to '70.

JUDGE HINKES: You understand that, Mr. Tise?

THE WITNESS: Yes.

JUDGE HINKES: Very well.

By Mr. Curnin:

Q Would it be correct to say that if as a result of these tests which you have described, the raw milk may be accepted or may be rejected at the plant?

A Yes, we occasionally do reject entire tankloads of milk on the basis of the tests we perform before it is unloaded.

Q What is the next step that the raw milk goes through after these preliminary tests, or at least initial tests are undertaken?

A If the milk is acceptable, it is then unloaded through a series of stainless steel pipes, using stainless steel pumps, and a series of air-operated and electrically-controlled valves, milk is directed into raw milk storage tanks.

Q You talk about the flow of milk here being operated by electrically-controlled valves. Do you know how many of these valves are in operation at the Woodstock Plant, and were during this time period?

A There are approximately 1200 in the entire system.

Q Can you tell me the approximate cost of these valves?

A The replacement cost today would be approximately $2000 for each valve, to purchase and install.

Q After the unloading process is completed, did you state that the product is then put into storage tanks?

A Yes, sir, it is in two storage tanks.

Q And can you describe the tanks that were at Woodstock during this period of time? I mean the size, how big a tank are we talking about?

A There are two 35,000-gallon storage tanks.

Q Do you know the manufacturer of that equipment?

MR. MATHIAS: Your Honor, I am going to object. This seems to be rather far afield. What difference does it make what valves cost and who manufactured particular equipment?

JUDGE HINKES: Aren't we, Mr. Curnin, interested from your point of view in whether or not this product has undergone a change which makes it a new product, and therefore the interstate chain is broken? Isn't that your line of argument?

MR. CURNIN: That's correct, your Honor.

However, the cases which have dealt with this subject, and there haven't been a great many of them, either when dealing with raw milk or when dealing with crude oil, the courts, and it is mostly the appellate courts, have looked at the entire picture to see what happens with the product.

JUDGE HINKES: What happens with the product?

within the guidelines that your Honor has established, and to avoid as I understand it the reference to equipment which is used for storage and the like.

JUDGE HINKES: Well, I wouldn't worry about that too much, Mr. Curnin, except to this extent: I think the witness can be asked to describe the process by which the raw milk finally becomes the finished product.

And then perhaps after you have heard that from the witness, we will be in a position to ask the witness some of the details of the equipment used to make the change, that's all.

MR. CURNIN: I'll follow that procedure, your Honor.

By Mr. Curnin:

Q We were at that point, Mr. Tise, where the raw milk had undergone some initial or preliminary tests, and had been passed through into raw storage tanks.

Are these tanks used for any other purpose?

A No. These two tanks are only used for the storage of raw milk. Under no circumstances are they used for a pasteurized product.

Q What is the next step, the next procedure followed?

A The milk is pumped from the two initial tanks through a mechanical process called a clarification. A clarifier removes -- it is a large piece of equipment, a centrifuge, that removes sediment, extraneous matter from the milk.

Q When you say it removes extraneous matter from raw milk, just what are you talking about? I mean what is being removed? Impurities or --

A Impurities, and there are certain body cells from the mammary system of the cow that are removed. If the cow, or the herds have mastitis, there is possibly some blood removed by clarification.

Q Just how does this clarification process work?

A A clarifier is a large framed,stainless steel framed machine, and inside is a set of stainless steel disks. And during operation, this -- these disks are rotating at a high rate of speed. The milk is fed -- forced into the machine.

The heavier particles, sediment, extraneous matter, and so forth, is thrown on the outside of the bowl, the periphery. The milk works to the center of the bowl with the centrifugal force and then is forced out from the machine into a cooler which reduces the temperature to 38 degrees or below.

Q Is there any particular purpose behind reducing the temperature of the milk after it comes out of the clarifier?

A Yes, there is. There is a certain temperature rise in milk when it is -- when it is forced through that ar 11

clarifier. Generally it will increase the temperature three to four degrees. And we use the cooler, which is a set of stainless steel plates with refrigerated potable water flowing across the surface of the plate on the opposite side.

This reduces the temperature and improves or maintains the quality of the milk.

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Q After the raw milk has gone through the clarifier and has cooled, what is the next process?

A. It goes to further storage. The Woodstock plant has 14 additional raw milk storage tanks that have in capacity from 10,000 gallons to 25,000 gallons each. And there it is held for further processing.

Q These tanks, are they used for any other purpose than the storage of raw milk after it comes through the clarifier?

A. Under no circumstances are those tanks used for anything other than raw products.

Q What is the next processing step that occurs after the milk has been cooled and put into these various storage tanks that you have mentioned?

A. Well, standardization refers to a change in the milk composition, primarily the butterfat content. If the butterfat content is higher than local state, federal, and company standards, the butterfat content is reduced by a process we call standardization.

This would be the addition of skim milk to reduce the butterfat content. If, on testing, the butterfat content of the milk is too low in those storage tanks, we may add a cream to increase the butterfat content to meet the desired state and local, federal standards.

Q Is Grade A powdered milk ever used here?

A. No.

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Q Does the milk also go through a separation, the raw milk also go through a separation process?

A. Some raw milk. We don't separate all of the raw milk that we take into the plant, but we separate sufficient quantity of raw milk each day to give us skim milk and cream to use in manufacture of other products.

Q And what process is involved to achieve that?

A. Separation is the treatment of milk to separate the butter-fat portion, which is called cream from skim milk.

Q How is that done?

A. And to accomplish this, a separator is a centrifuge very similar to the clarifier. We pump raw milk from raw storage through a set of plates and warm it, or heat the milk from 38 to 40 degrees through this series of plates to 110 degrees.

Then the milk flows to the separator and then by centrifugal forces, separation is accomplished. The butterfat portion of the milk, being lower in specific gravity, goes to the center of the bowl. The higher solids and higher specific gravity product, which is the skim milk portion, flows to the outside of the bowl and the cream discharges through one port to a set of cooling plates and then into further storage.

The skim milk flows through another discharge port through a series of plates where it is cooled to below 40 degrees and goes to further raw milk storage.

Q After the standardization, possibly, separation has occurr dh3 What is the next process that the raw milk will be sent through?

A. If we -- well, this would be possibly fortification. We fortify products. This could refer to the addition of vitamins, minerals, and in some cases, the addition of milk solids not fat. And in Woodstock we add solids not fat to some products by the addition of a 40-percent skim condensed product.

Q. Is Vitamin D added to the product?

A. Yes, Vitamin D is added to Vitamin D homogenized milk.

Q. And how much of that is added? Is it controlled and regulated?

A. Yes it is. We add the Vitamin D from a concentrate so that the finished product is 400 USP units of Vitamin D per quart.

Q. When you talk about USP units, what do you mean there, Mr. Tise?

A. Well, this is a unit of measurement for that food nutrient.

Q. Is it at this point that the raw milk is now ready for pasteurization?

A. Yes, it is.

Q. And would you tell us what happens at this point?

A. Well, in pasteurization there are two methods. One, the holding method. The Woodstock plant, well, the holding method we don't use, but I will tell you what it is. It is 143.5 degrees Fahrenheit for 30 minutes in a large vessel.

The Woodstock plant, for homogenized milk, uses the high temperature short time method. This is a large system. It is composed of a series of plates that are contained in a large stainless steel frame. There are three separate sections of plates on this frame. Raw milk is pumped from the storage tanks to a small balance tank at the beginning of the pasteurizing system, and from this small balance tank, the milk is forced through a heat exchange unit we call the regenerator, which uses cold raw milk on one side of the plate, and hot pasteurized milk on the opposite side.

The cold raw milk enters the regenerator at 40 degrees. It discharges at about 138 to 140. And from that section it goes into a heating section which is another series of plates that uses vacuum steam on the opposite side to heat it to 175 degrees.

It discharges from the heater section and goes to the homogenizer at 175 degrees. It is homogenized. And the purpose of a homogenizer is to break down the butterfat globules that normally occur in milk from 8 to 10 microns in size to 2 microns or less in size.

It reduces the surface tension of the product. It makes the butterfat in breaking it up, it increases the number of globules in the milk. It increases the globule surface. This renders the butterfat -- it's in suspension in the milk so that the cream no longer will rise to the surface.

Now as the milk leaves the homogenizer, it goes to a series of pipes we call the holding tube.

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Q Let me interrupt you if I may, Mr. Tise. When you talked about pasteurization at the Woodstock plant, and you talked about the temperature which the raw product is subjected to, for how long a period of time is that?

A It's in excess of 20 seconds.

Q That is at 175?

A Yes, it is.

Q Degrees, is it?

A Yes.

Q Would you tell the Court, what is the basic purpose behind this temperature increase of the raw product for this time period?

A Pasteurization is used to kill the harmful bacteria, disease-producing bacteria in raw milk.

Q Are we talking about specific bacteria which we know are in raw milk?

A We are talking about many different species of bacteria which may be in raw milk, normally occur in raw milk.

Q Can you identify some of those for us, sir?

A Well, there are hundreds of varieties, but I could name streptococcus lactis. There are many different pseudonymous types. There are choloform. Those come to mind immediately, but there are many, many different species.

Q What practice is followed up after homogenization?

A After homogenization, the product flows into a series of piping which we call the holding tube. There it's held for a

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minimum of 15 seconds. But as I -- the entire time of holding at 175 is in excess of 20 seconds. The milk leaves the holding tube, back into the pasteurized side of the regenerator?

Q May I interrupt you again, Mr. Tise? When you talk about here in the holding tank or the holding period, again, the product is being subjected to high temperature for in excess of 20 seconds and the purpose of that is?

A. To kill harmful bacteria.

Q All right.

Then would you continue what happens to the product at this point?

A. The milk flows to the pasteurized side of the regenerator and the whole milk is being used to heat the cold raw milk coming in.

Of course, the cold raw milk coming in helps to cool the hot pasteurized milk being on the opposite side of the plate. Thus we have regeneration. The product leaves the regenerator into a cooling section where it is further cooled to 40 degrees or below, using cold potable water on the opposite side of the plate surface.

And from the cooling section it flows through a series of pipelines, again, air-operated valves, electrically-control valves, into a series of pasteurized ~~surge~~ storage tanks.

Q How many did they have at Woodstock at this time?

A. There are six pasteurized storage tanks.

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Q Can you tell us their capacity?

A I don't have the total capacity. They have in sizes from 10-25,000 gallons each. But I don't have the total capacity of the six tanks.

Q During the course of your testimony, Mr. Tise, you described for us in general terms the various vessels or pieces of equipment that are being used. I want to stay away from maybe what can be referred to as hardware, although it may be expensive hardware.

And to address myself to specific pieces of equipment that are required to bring about mechanical, chemical, I don't know just what change or process is involved, but one of them for example that I recall your mentioning is the clarifier.

Is that a separate piece of equipment now?

A Yes it is. There are two of those machines in the Woodstock plant. It is -- they are separate pieces of equipment.

Q Who manufactures that equipment?

MR. MATHIAS: Your Honor, I am going to object. What difference does it make who manufactures the equipment in the plant?

JUDGE HINKES: Let's get to the critical question, I think you are concerned about costs, aren't you?

MR. CURNIN: I am, your Honor, but in connection with the process that occurs, I am advised that the manufacturer of the equipment, that that is a fact that should be known. I don't think it takes any time here. I am just trying to complete the record here.

JUDGE HINKES: Well, you may continue. We are probably using more time to discuss it. But I really don't see it matters one bit whether it's manufacturer A or manufacturer B, I don't think that is going to get us at all involved, but you may continue.

By Mr. Curnin:

Q The manufacturer of this particular product.

A We have centrifuges in the Woodstock plant, some of them are manufactured by an American company called DeLaval. There are other centrifuges in the Woodstock plant manufactured in Germany by the Westphalia Company in West Germany.

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Q This clarifier we are talking about, what does that equipment cost?

MR. MATHIAS: Your Honor, I am going to object again. What is the difference what the equipment costs?

JUDGE HINKES: We will allow it. If you know.

THE WITNESS: The replacement would be at least $60,000 each. So we have two.

By Mr. Curnin:

Q What about the separator that you mentioned, sir?

A There are three of those, and they would -- their replacement would be approximately $60,000 each.

Q And the equipment that is used in pasteurization?

A For the high-temperature short-time method of pasteurization which I described, we have three units. Two of them are rated at 60,000 pounds an hour each. The other is 40,000 pounds an hour each.

Q The replacement cost of that equipment?

A Approximately $2000 for each 1000 pounds of rated capacity.

Q And the homogenizer that you have referred to?

A Well, there are three of those, and there are in these high-temperature short-time systems, they would -- their replacement would cost about $1000 for each 1000 pounds of capacity.

Q I have just one final question on this area of equipment and cost.

If we were to evaluate the equipment that is involved, starting with what happens when the raw product reaches the plant and starts through its initial test through pasteurization, homogenization and fortification until it is ready to be packaged, what would the total cost of the equipment be, if you can estimate for us, that is used in pasteurizing, homogenizing, fortifying raw milk?

And before you get into now the manufacturing side of the byproducts. Just talking about homogenized Vitamin D milk.

A I would estimate the replacement for the equipment alone would be in excess of $4 million. I would say between $4 million and $5 million. Equipment alone.

Q Passing now from homogenized Vitamin D milk to certain byproducts, could you tell us what was involved at the Woodstock plant during this time period in the manufacture of 2 percent milk?

A Two-percent milk would be a blend of raw whole milk and raw skim milk in the raw milk storage tanks. The whole milk would be tested and standardized by the addition of raw skim milk, then the fortification, post-fortification with 40-percent skim milk condensed in these tanks.

Q Would Vitamin A and/or Vitamin D concentrate be added to this product?

A I can't testify that it was added in the period prior to 1970.

Q Can you tell us, sir, what is involved in the manufacture of skim milk at the Woodstock plant?

A Yes. Skim milk would be -- it would be fortified in a raw milk storage tank and then pumped to the pasteurizing system and go through the same equipment as the homogenized Vitamin D milk.

Q Is the butterfat content controlled in the skim milk product?

A Yes.

Q And are the vitamins added to this product?

A Yes. There are 400 units of Vitamin D and 2000 units of Vitamin A. Those are added in the raw milk storage tanks, and we also add additional milk solids not fat to that product in the raw state ahead of pasteurizing.

Q Going now to the manufacture of chocolate milk at Woodstock during this time period, how is that manufactured?

A Chocolate milk would also be made in the raw milk storage tanks. It would be a blend of raw whole milk with raw skim milk and added to it to reach the desired butterfat level. Then we would add -- we would incorporate chocolate powder and sugar. Then that mixture would be well agitated, then pumped to the short-time pasteurizer system and then back through the cold milk pasteurized ~~surge~~ storage tanks.

Q So that the powder and sugar and whatnot are added prior to pasteurization?

A Yes. Yes.

Q Would you describe for us, Mr. Tise, the process that is involved and was involved during this time period in the manufacture of buttermilk at Woodstock?

A Yes. Buttermilk would be raw skim milk added to a different type pasteurizer, and I mentioned the holding method of pasteurization.

There are approximately ten large 1000-gallon vat pasteurizers. The raw skim milk for buttermilk would be added to one or more of those vessels. Butterfat adjusted to meet the desired standard. The heat would be raised to 165 degrees Fahrenheit. That temperature would be held for 45 minutes to an hour. Then the product would be cooled in that same vessel by circulation of cold water through a jacket until the milk reached the temperature of 72 degrees.

At that time it would be innoculated with a desired culture of bacteria called bulk starter and held at the temperature of 72 degrees for 14 -- well, 14 to 16 hours, at which time it would have become cultured buttermilk.

At that time when it has reached its desired flavor, titratable acidity, it would be cooled in that vat to 40 degrees. Then it is ready to be packaged.

Q Will you describe for us, Mr. Tise, the process that is involved in making half-and-half at Woodstock during this time?

A Half-and-half would be a blend of raw whole milk and raw cream. This would be again a process of standardization in a raw milk storage tank. The ~~produce~~ product, after check testing to determine that it did meet the desired butterfat standards, would be pumped to the short-time, high-temperature short-time system and pasteurized, homogenized, then back to a pasteurized ~~surge~~ storage tank ahead of the fillers.

Q What of the product whipped cream?

A Whipped -- well, whipping cream would be the -- whipped cream is a product after it has had air incoporated. But we would call our product whipping cream. It would be a cream of 32-percent butterfat or more, a minimum of 32-percent butterfat. And pasteurized, cooled, ready for packaging.

Q How was sour cream made at the Woodstock plant?

A Sour cream is made by the holding vat method. It would be a blend of raw whole milk and raw cream put into a pasteurizer vat or processing vat. The proper butterfat level attained. Heated to 185 and held at that temperature for a minimum of 45 minutes, then cooled to 70 to 72 degrees. A desired known culture of bacteria added. Incubated at 70 to 72 degrees for 14 to 16 hours and at that time it would have coagulated and developed the desired body, flavor and it would be cooled by circulating cold water through the jacket. Then it is ready to package when it cools below 45 degrees.

Q Could you explain for us why the bacteria is added to this product?

A We add the bacteria to produce the -- develop lactic acid from the lactose that is in milk, and in doing so they coagulate the protein that is in milk and also develop flavor, body, texture, flavor, aroma, until you have sour cream.

Q How was eggnog manufactured at the Woodstock plant?

A Eggnog would be a blend of raw whole milk and raw cream in a raw storage tank, and also in that tank would be added sugar, egg yolk solids, some stabilizer; then it would be pasteurized into a pasteurized ~~surge~~ storage tank, then the desired flavor material would be added, which includes, well, includes some spices and rum and so forth to develop the eggnog flavor. Then it is ready for packaging.

Q I just have one final question in this area, Mr. Tise. How was onion dip manufactured at this plant during this time period?

A If onion dip is made from sour cream, and I can't testify that at that time onion dip at Woodstock was made from sour cream --

MR. MATHIAS: Your Honor, if this is to be speculation, I ask that the witness not speculate.

MR. CURNIN: Your Honor, what I would suggest is with the approval of the Court, if there are one or two method to have this witness define both. Then we will bring on further evidence if it need be as to just what was the process employed at Woodstock at that time.

JUDGE HINKES: Very well.

THE WITNESS: There are two common ways to -- methods for making sour cream --- onion dip. One would be to use sour cream, as I have previously described it by the addition of a flavoring base to make the onion dip.

There is another method using vegetable fats to replace butterfat, and the processing procedure would be to use milk solids, not fat, with raw whole milk. The addition of vegetable fat to the desired butterfat content, heating that to 185 for a minimum of 45 minutes, holding it at that temperature, then cooling it to 70 to 72, adding the same type of culture bacteria, incubating it for 14 to 16 hours.

Basically it is the same product except the vegetable fat is substituted for butterfat.

MR. CURNIN: Your Honor, this completes the major portion of my direct, and certainly this area of testimony that I wish to cover with the notice.

I know he has been on the stand for a little over an hour. With the Court's permission, may we have a short recess at this time?

JUDGE HINKES: Very well. We will take a short recess now.

(Recess.)

By Mr. Mathias:

Q Yes. This process of adding the vitamin A and D concentrate and possibly the skim milk nonfat concentrate, this would be a mechanical process of adding these to the milk in the vat; is that correct, sir?

A Are you referring to at the present time?

Q Yes, sir.

I am really referring to the period '64 through -- I mean '66 through '70, if you knew -- know how it was done in that time.

A I don't know how it was done at that time.

Q How is it done today?

A But basically it -- it is added in the raw milk state ahead of pasteurization.

Q It is just physically added?

JUDGE HINKES: Is it a mechanical process or a chemical process?

THE WITNESS: No, it is a manual process.

JUDGE HINKES: Very well.

By Mr. Mathias:

Q Now, in connection with the pasteurization process, you spoke of holding this -- the milk in the pasteurization process, the homogenized milk, at a temperature of 175 degrees for over 20 seconds.

Now, when you use the term "over 20 seconds," do you mean approximately 20 seconds?

MR. CURNIN: Your Honor, before the witness answers, may I have the question read back?

I think counsel is talking about -- and included in his question -- pasteurized and homogenized milk. May I have the question?

JUDGE HINKES: Yes.

(Whereupon, the reporter read the pending question, as requested.)

MR. CURNIN: It is at that point, your Honor, I think that is a misstatement of the witness' testimony.

JUDGE HINKES: I think the homogenization takes place after the pasteurization.

MR. CURNIN: That is my understanding, your Honor.

JUDGE HINKES: Is that correct, Mr. Tise?

THE WITNESS: The milk is heated to 175 degrees in the heating section. When it discharges from that heating section, it is at 175 degrees going to the homogenizer. The temperature of -- or the pressure of homogenization actually adds 1 or 2 degrees to the temperature of the milk.

JUDGE HINKES: We are not concerned about the temperature. We are speaking of which comes first, the pasteurization or homogenization?

THE WITNESS: The actual pasteurization, the heating of the milk is accomplished in a series of clean plates.

The homogenizer is in effect part of the holding time at the pasteurizing temperature.

By Mr. Mathias:

Q So that the homogenization is a part of this holding time at the pasteurizing temperature?

A It is, but it is not part of the legal holding time as specified by the U.S. Public Health Service standard ordinance and code, because the holding tube must be sufficient length to hold the milk a minimum of 15 seconds from the time it enters the holding tube until it hits the flow diversion valve.

So the homogenizer is not part of the legal holding time, but it is part of the overall holding time at 175 degrees.

Q All right, sir. I believe I understand that.

I understood your testimony to be that for this entire holding time in which the product was held at 175 degrees or approximately at that level, through the -- which would include the homogenization, that the entire holding time was over 20 seconds.

A You are correct, because I did testify that the entire holding tube, or entire holding time was in excess of 20 seconds. That includes in the holding tube plus the homogenizer and the pipe -- the stainless steel pipe from the heating section to the homogenizer and from the homogenizer back to the holding tube.

Q Now, sir, my question is whether or not this -- when you speak of this time, the milk being kept at this temperature in excess of 20 seconds, just how much over 20 seconds? Is this approximately 20 seconds, or is this a great deal in excess of 20 seconds?

A No, it is approximately 20 seconds.

Q Now in the case of 2 percent milk and skim milk, I believe that with the exception of standardization, as I understand your testimony, these products went through the same pasteurizing, homogenizing procedure. Would that be correct?

A It is basically the same process, yes.

Q The only difference is the butterfat of the milk going into the process?

A Yes, and the vitamins and minerals which we have discussed.

Q Now, as I understand your testimony concerning chocolate milk, this went through the same procedure and the only exception there again would be the procedure of standardizing the basic product with raw whole milk and raw skim and adding the chocolate powder and the sugar and agitating it prior to putting it into the processing procedure; is that correct, sir?

A That is basically correct, yes.

Q And again, this would be basically correct with the products half and half and whipping cream, would it not?

A No.

Q It isn't? What difference occurs?

A This is a different process, because -- well, buttermilk?

Q No, not buttermilk. I said half and half.

A All right.

Half and half would be the use of raw whole milk, and raw cream. It would take much larger quantities of raw cream, because the finished butterfat content should be 11-1/2 percent.

Q And -- well, other than this standardization, is -- would it then -- after it was standardized to this level --

A After standardization and possible fortification or the addition of solids not fat, the process would be basically the same as for homogenized milk. To the same pasteurizing system, homogenizing, cooling and pasteurized surge.

Q Now in the case of whipping cream?

A Whipping cream would be -- not be pasteurized by high temperature, short time. That would be pasteurized in a pasteurizing vat, heated probably to a hundred and -- well, above 160 degrees, held for a minimum of 30 minutes. In lmf1

By Mr. Mathias:

Q Now, in speaking of the homogenization, you spoke of breaking up the fat globules in the milk. Just how is this done, what process is the milk put through in order to accomplish this?

A A homogenizer is a larger positive pressure pump. It forces milk through a very small orifice, and the pressure on that orifice is controlled manually. That pressure can be applied up to 2500 pounds per square inch at any desired level, from zero to 2500 pounds.

Q Now I take it that the pressure, pushing this milk through a small orifice breaks up the fat globules; is that correct?

A The pressure forcing it through does not break up the butterfat globules. The shearing action of the product flowing through that valve, there is a shearing action that breaks up the butterfat globules.

Q Well, what do you mean by a shearing action?

A Well, the path of the milk is the change -- the flow of the milk through that valve is changed 90 degrees. And by applying pressure at that point, the butterfat globule is sheared.

Q In other words, as I understand it now the milk is coming at that orifice at a 90-degree angle?

A It is coming at an orifice at this direction.

Q At a 90-degree angle?

2mil

A As it comes in, it goes directly into it. And as it discharges, it goes this way in 360 degrees.

Q So this would act in somewhat the same manner as a knife, then, cutting the fat globules up; is that correct, sir?

A And as it passes the interface of that valve, it shears the globules, particles.

Q Now this is basically a mechanical process?

A It is a mechanical process.

Q What is the purpose of homogenization, Mr. Tise?

A Well, there are several reasons why homogenization is used. Basically, it, in breaking the butterfat globule size from its original eight to ten micron size to less than two, it prevents the rise of butterfat in a bottle of milk. And so it, after homogenization, you have a homogenous mass with the butterfat mixed throughout the container of milk.

Q I take it, Mr. Tise, that this is in contrast to the relatively older days within the dairy industry when the cream in a bottle of milk would rise to the top and you had all the cream on the top?

A It is in direct contrast to the old cream line milk that was produced 25, 30 years ago. Prior to 1939, because prior to that time all dairies took great pains to extend their cream line as far down from the top into the bottle as

3mil

they could because they wanted a distinct yellow layer of fat.

Q This made the customer think he was getting a lot better grade of milk?

MR. CURNIN: Objection, your Honor. I don't think what the customers thought in 1939 has any relevancy to this case whatsoever.

JUDGE HINKES: I think we can go on. There is not much point in this inquiry as to what was done in 1939, really, is there, Mr. Mathias?

MR. MATHIAS: Oh, your Honor, but there is a reason that I am trying to connect up here as to why the product is homogenized, and I believe it -- it is only this one question. It is clarifying a point brought out by the witness. I don't see where it is objectionable.

MR. CURNIN: I object to the reference, your Honor, which is clearly beyond the time period of any relevancy in this case.

JUDGE HINKES: I think we can avoid 1939 in any event.

By Mr. Mathias:

Q In any event, Mr. Tise, the basic reasoning by homogenization is to mix the cream up into the milk in a form that it will not separate; is that correct, sir?

A That is one of the main purposes.

4mil

Q What would be another purpose?

A It reduces the curd tension of the butterfat, makes it more easily digestible by the human body. And to some people, it makes the product more palatable.

Q Now, Mr. Tise, we have spoken of several different processes milk is put through on its way through the Woodstock plant. I take it that these are basically the same processes which the milk is put through in any dairy plant; is that not correct?

MR. CURNIN: Objection, your Honor.

JUDGE HINKES: Again I don't know why we are going into any other dairy plant, if we can avoid it, Mr. Mathias.

MR. MATHIAS: All right, sir.

By Mr. Mathias:

Q Well, in connection with the processes such as separation in the raw milk and the pasturization, these are processes that could be done at home by the home-owner, are they not, sir?

A No.

Q Not in the same manner, but the same basic process can be effected at home, can it not, sir?

A It would be impossible to homogenize.

Q I didn't mention homogenization. I mentioned the separating, separating of the cream and pasteurization.

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7mil

think there is on the market a small enough model of a separator to effect the separation of milk and cream. I suppose if you, as a home-owner, wanted to buy milk and leave it sit in a vessel in the raw state until the cream rose to the surface and then you, by some means, would remove that cream, manually, you would not get very good efficient separation of the butterfat and the cream -- or butterfat and the skim milk portion. Once you had it, you wouldn't know the butterfat test on either the cream or the skim portion. And so far as separation, if you wanted to try to devise some means of home pasteurization by water bath, I suppose you could do it. But it wouldn't be very sanitary, generally. You would end up with all types of contaminating sources.

By Mr. Mathias:

Q The homeowner could cook the milk, though, to a certain degree temperature with a thermometer in the milk and keep it at that state for 45 minutes and pasteurize the milk, could he not, sir?

A If they learned to become proficient at it and had the proper equipment, it would be possible. But again it would be very impractical.

Q Now, Mr. Tise, it is a fact, is it not, that federal regulations require milk to be pasteurized in order to have it shipped across state lines?

MR. CURNIN: Are we talking about April, 1974?

8mil

MR. MATHIAS: During the period 1965 through 1970.

MR. CURNIN: I would object, your Honor, as being beyond the scope of the direct examination.

MR. MATHIAS: Your Honor, I don't believe it is. I believe this is within the general operations of the Borden Company as described on direct. Obviously on cross, we are not limited to the exact questions posed by A&P counsel on the direct.

MR. CURNIN: But we are certainly limited, I think, your Honor, to the subjects that were covered.

JUDGE HINKES: Well, I do think that this is within the general purview of the subject that was covered on direct examination and I will overrule the objection.

By Mr. Mathias:

Q Do you recall the question?

A Interstate milk shipment is required to be pasteurized.

Q In your questioning by Mr. Curnin, you were asked specifically as to the Excelo packaging equipment at the Woodstock plant. Was there any packaging equipment at the Woodstock plant other than Excelo equipment during this period '60 through '70? Or '65 through '70?

A Yes. I don't know how many. But there were some fillers made by the American Can Company.

Q Would this trademark be Canco?

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I gather that this was a rather efficient plant. Did it require a smaller labor force than the average dairy plant?

MR. CURNIN: Objection, your Honor; I think this well beyond the scope of the direct.

JUDGE HINKES: No, I think I must overrule that. The witness was being questioned upon the operations of the Woodstock plant and I think this comes within that purview. If the witness knows, of course.

By Mr. Mathias:

Q You do not know, is that your answer?

A I don't know. I mean I have no knowledge of whether it took less people.

MR. MATHIAS: No further questions on cross, your Honor.

JUDGE HINKES: I have one question, Mr. Tise. You described the number of processes that started with the raw milk from the farm and ended up, let us say, with the vitamin D, homogenized whole milk. Can you tell me at what point in your opinion the labelling of the product as raw milk became inappropriate?

THE WITNESS: Well, once it left the -- once it became pasteurized.

JUDGE HINKES: Until it was pasteurized it was still raw milk, is that correct?

THE WITNESS: Yes, sir.

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JUDGE HINKES: Now, then, after pasteurization, but before homogenization, what would the product be considered?

THE WITNESS: Well, prior to the time it was held for a minimum of 15 seconds at 161 degrees Fahrenheit, it is raw milk. Oncee it is been heated to in excess of 161 degrees Fahrenheit and held for 15 seconds, it is pasteurized.

JUDGE HINKES: Now, is there a difference, then, in the product that is known as pasteurized milk from vitamin D whole milk that is sold in the carton?

THE WITNESS: Well, pasteurized milk could be of any butterfat above a given minimum, and pasteurized, without any other treatment. But homogenized vitamin D. milk must be at a, or above a, given minimum, plus fortified with 400 USP units of vitamin D per quart.

JUDGE HINKES: Now let me understand that. The pasteurization consists merely of holding the milk at a certain heat for a certain period of time, is that correct?

THE WITNESS: That is true.

JUDGE HINKES: The homogenization consists of a certain mechanical process, is that correct?

THE WITNESS: True.

JUDGE HINKES: The fortification of the milk consists of the mechanical addition of a substance to the milk?

THE WITNESS: True.

JUDGE HINKES: Is anything else done to the milk

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before it winds up on the grocers' shelves, aside from delivery?

THE WITNESS: So far as fluid milk is concerned, I am not sure that I understand your question.

MR. CURNIN: Did your Honor mean this literally, Sir? I mean there are obviously, and I do not want to comment upon this necessarily while the witness is in the room.

MR. MATHIAS: Your Honor, I would ask --

JUDGE HINKES: Perhaps, I left out one thing. Of course, there is the packaging in addition to delivery. Now, what I want to know, is anything else done to the milk aside from, from the moment it leaves the fortification and homogenization and pasteurization, you have got a fluid product at that point?

THE WITNESS: Right.

JUDGE HINKES: Now, is there anything else done to the milk aside from packaging and delivering?

THE WITNESS: No.

JUDGE HINKES: All right, that is all I wanted to know.

MR. SCHAEFER: Your Honor, if I may interject for the benefit of the witness --

MR. MATHIAS: Your Honor, I would like --

MR. SCHAEFER: The witness's answer stands on the record. The witness has testified earlier to the process of clarification, which your Honor did not include in the

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series of questions your Honor asked because you started it at the pasteurization process.

JUDGE HINKES: I did that deliberately because the witness's testimony the record will show referred to the product at that point as raw milk. That is why I started there.

MR. SCHAEFER: Yes, sir, I just wanted --

JUDGE HINKES: I wanted to know --

MR. SCHAEFER: -- mislead the witness to change his answer.

JUDGE HINKES: No, I only wanted to know at what point thereafter it lost its characterization as raw milk, if it did. Are there any other questions?

MR. CURNIN: I have just two questions, your Honor.

xxx

REDIRECT EXAMINATION

By Mr. Curnin:

Q After the milk has been homogenized is it then helf for a certain period of time and heated for a certain period of time.

A In the Woodstock process, when the milk reaches the homogenizer, it is at 175 degrees.

Q Now, is there a difference between raw milk as it comes into the Woodstock plant from the farm, from the cow, and raw milk which has been processed through a clarifier.

A Yes.

Q You were asked some questions about the equipment in coaching the witness, but I would like to put a statement on the record that might end this lengthy line of questioning and expedite matters.

JUDGE HINKES: Yes. That might be helpful. Would you step out of the room, Mr. Bitting, please?

(Witness was excused from the hearing room.)

MR. MATHIAS: Your Honor, in addition to Mr. Bitting's assumption in connection with this particular witness, there is additional testimony in the record by Mr. Kristoff from Burger's appearing at page 2279 of the transcript in which Mr. Kristoff states the method of rebating by Borden to Burger's during the period 1966 through 1970 -- for the record I might note Mr. Kristoff's name is spelled K-r-i-s-t-o-f-f --

And during that period Mr. Kristoff stated he received a rebate based upon a percentage of the total purchases once a month. This was for the entire period. So if in fact he was paid a percentage of his total purchases during this entire period, this would support Mr. Bitting's supposition under which he has taken the rebate and applied it as a percentage of the total purchases.

So in view of this additional evidence in the file it would seem to me that to belabor the record with very extensive questioning as to whether or not there was any grounds for Mr. Bitting's supposition is unnecessary.

particular months.

Mr. Shaffer's statement in effect confirms our investigational finding that these are the only records for this period of time. There are no other records of the Borden Company for these sales.

Now, I would like to stress in connection with the relevancy there have been a number of innuendos and references comparing this particular exhibit, Commission Exhibit 183-A, with the price comparison charts which we had prepared for certain Indiana customers which have already been received in evidence.

I think to make such a comparison is improper. This document does not purport to do the same as those documents in the Indiana area. There is no place in this document where it purports to set out the exact dollar amount of discrimination between A&P and any of these customers.

What we have done here in effect is to conduct a survey. We set up that survey on the basis of all customers on a particular route in the Chicago Metropolitan area purchasing from the Borden Company in excess of $800. That is all retail store customers. We did eliminate schools and restaurants and hospitals and items of that sort from our tabulation.

With that in mind we had only one purpose in this exhibit, and that was to compare in a rough manner the basic discount on an overall month basis that these customers were and not one single one of them has tied up the Reuter Dairy with the Borden operation.

As a matter of fact, Mr. Daube, who was the one who was called to authenticate this particular document, testified clearly and unequivocably that the Woodstock Dairy was not known as Reuter Dairy and that to his knowledge none of the processing plants of Chicago's central division were known as the Reuter Dairy.

JUDGE HINKES: Let me interrupt you for a moment, Mr. Mathias.

I think it has been conceded that the Column 1 figures on 65 are the Woodstock figures; is that correct?

MR. MATHIAS: Your Honor, Mr. Daube so testified. Complaint counsel has made no concessions but there is testimony to that effect in the record.

JUDGE HINKES: Now, whether or not witnesses were unable to authenticate any other figures on this document is not the issue. The issue is whether or not this witness has authenticated the figures.

Now, this witness in effect, and correct me if I am wrong, testified that the figures that he reached in Column 13 were based upon the figures in Column 12 divided by the figures in Column 1.

MR. MATHIAS: Yes, sir.

JUDGE HINKES: Now, the first thing I would like to for which there will be, you say, proof of a violation of all of all of the elements of the 2F case.

MR. MATHIAS: This is where we are going to get into the injury question. That is correct.

MR. MCINERNEY: Including the impact on competition and therest of it is pretty much general background.

MR. MATHIAS: Correct.

MR. MCINERNEY: May I ask the basis for the selection of these particular time periods and places?

MR. MATHIAS: It was availability of the records. There was obviously---- With Gary, Hammond and Valparaiso , the commerce question came into our mind in the selection of those particular customers. We wanted to just space these time periods out so they would give an indication of the extent of discrimination over a period of time and the end period up to March, 1970 of course had to do with making it as recent as we could.

At the time we obtained this documentation or started to obtain this documentation, this was a very current time period and of course we had to cut off some where and we cut it off at March, 1970.

MR. MCINERNEY: You don't mean to say and correct me if I am wrong, that the basis of this selection was the availability of records and there were no records of other time periods for these places or other places for these time periods?

MR. MATHIAS: No. I said this was one of the bases. For Instance, February and March of 1966 was selected as opposed places and other time periods, and that in making this selection for your purposes, as you said, there must have been some basis for it other than pulling it out of a hat.

MR. MATHIAS: We were interested in the Chicago Metropolitan area, including the Northwestern portion of Indiana because this appeared to involve the major portion of sales of private label by Borden to A & P. That is why this basic area was selected. Valparaiso came into it because one of the independent chains involved in the Gary-Hammond area happened to have a store in Valparaiso.

We took the invoices to the entire chain. This is the way the basic areas were selected. How particular routes were selected, I was not there at the time. How particular customers were selected, this was the investigative process of Mr. Palowitz and not mine and I do not know how he obtained the names of various customers.

MR. MCINERNEY: Your Honor, I think in addition to getting the specification of where we are going with respect to the rp counts, as you put it, we would also like to have the production of documents that we requested and respectfully remind Your Honor, you have not yet ruled on the request.

HEARING EXAMINER SCHRUP: Yes, there is one subpoena that was directed to the Secretary of the Commission and I was holding that in abeyance to see what would happen, perhaps at this prehearing conference, and perhaps the next one to see whe we are.

shall receive these two exhibits of the Respondent A&P in evidence.

(The documents referred to, heretofore marked for identification as Respondent A&P Exhibits 2 and 3, were received in evidence.)

MR. WHITE: Your Honor, just as a matter of clarification, I assume that I should inquire as to what counts it is being received with respect to.

JUDGE HINKES: Mr. McInerney.

MR. McINERNEY: Well, I am not pressing any count against Borden at this time, Your Honor, in this forum. I think it goes to A&P's good faith on all three counts, as far as I am concerned. ~~But~~ I am ~~not~~ introducing it in defense of A&P.

JUDGE HINKES: I think that is a sufficient answer for the purpose.

A&P is not a charging party in this case, and its only interest, legitimate interest, would be in defending charges against it. And, for that purpose, of course, it is being received, but having been received it is available for any purpose in this proceeding.

By Mr. McInerney:

Q Now, Mr. Minkler, His Honor asked you a few questions about these documents, and they were qustions that I had intended to ask and I am afraid I interrupted the flow of it, to the Eagle people around that time.

MR. CURNIN: I have no further questions, Your Honor.

MR. WHITE: Nothing further.

MR. MATHIAS: Nothing further, Your Honor.

JUDGE HINKES: Thank you, Mr. Gose.

MR. CURNIN: May we go off the record, Your Honor?

JUDGE HINKES: Yes.

Off the record.

(Discussion off the record.)

JUDGE HINKES: On the record.

A motion has been made by Counsel supporting the complaint to receive in evidence the deposition taken of Mr. Malone some time ago.

Mr. Malone is now dead and I have asked Respondents for their reaction to the motion.

Mr. McInerney?

MR. McINERNEY: Your Honor, at the time that this deposition was taken, we objected to the taking of it on the ground that it was premature since we had only recently been served with the complaint.

It is my recollection that we had not answered at that point in time; that we had, however, requested the production of documents from both the Federal Trade Commission and from Borden and we asked for an adjournment of the deposition in order to permit us to study the response to those demands for documents --- and they were more than demands, they were formal requests for subpoenas.

Our objections were stated on the record at that time, and I won't belabor the record by going over them again.

Basically we were saying that we were not at that point in time properly prepared to cross-examine Mr. Malone. Nevertheless, despite those objections, the deposition went forward.

Since that time, we have become much more familiar with the accounting aspects of the case, which is what Mr. Malone was testifying to, in part at least, and we could, at this stage, present a much more thorough and I think more effective cross-examination of Mr. Malone.

I could give you specific instances of that with respect to particular phases of it but I think that the substance of our objection is that the examination was indeed premature at that time as far as Respondent A&P was concerned and before the deposition is received I understand that if it is received this objection would neverthless go to the weight of it and there are other objections noted in the deposition which will be considered, but as a preliminary threshold matter we do object to the reception of the deposition under these circumstances.

which he referred, and the data that it reflects.

Now, under those circumstances it seems to me that we are entitled to explore the underlying data.

JUDGE HINKES: But what are you going to explore? There is nothing in the record which will tell us what the exhibit is. All we have is the testimony of the witness and what he used he talked about, but you have nothing to go on.

MR. FALLS: If that is the case, then, the testimony should certainly be stricken.

JUDGE HINKES: That is up to you. If you wish to make such a motion, I will make a ruling.

But I don't think that what you are offering in evidence by way of exhibits is at all connected with the state of the record that was created on direct examination.

Had the exhibit been offered in evidence and received, then I could understand it, but let me put it to you this way: Do these exhibits in any way contradict, explain or modify his proposition that the differences between full service delivery and modified drop service delivery diminish as volume goes up?

MR. FALLS: I think they explain that proposition as applied to specific cases. After all, he did discuss, and I don't think this was only on cross-examination, the fact that he had conducted time studies.

JUDGE HINKES: If you are offering these exhibits to demonstrate what the witness has testified to, I think it is entirely appropriate, but I don't quite understand the function. I would think that if anything your purpose is to discredit what he has testified to, and not to implement it.

That is about all I could receive.

If you say you are offering these exhibits to demonstrate that the differences diminish as volume increases, which is what he testified to, very well. I have no objection to that, certainly. But I don't think that is what you mean.

MR. FALLS: No. I mean that the data on which he relied and about which he testified in arriving at his conclusion, it seems to me, can also support other specific conclusions.

JUDGE HINKES: What data are you referring to?

MR. FALLS: The time studies about which he testified. He testified that he participated in, managed, directed time studies which led him to this conclusion.

It seems to me that data having been relied on for that purpose, that I am entitled to inquire about the data.

JUDGE HINKES: What time studies are you referring to? His thesis?

MR. FALLS: The time studies that were reflected in many ways in his testimony, in this brochure, in Table 1 prepared for the Government, in these curves.

Those same time studies lie at the base of all of it, and I think they lie at the base of all the conclusions to which he testified.

JUDGE HINKES: Let's be specific. One thing we know is that his thesis was not relied upon. He said so. The fact of the matter is he was questioned why not.

MR. FALLS: No, the thesis is offered by way of contradiction or inconsistency of the data to which he testified he did rely on.

JUDGE HINKES: Let's go back now. I want to get first of all the data he relied on. What did he testify in that respect?

MR. FALLS: He testified as to full service and modified drop service delivery. In that connection he referred to Exhibit 181-B showing the two curves. I asked him on what data those curves were based. He said those curves were based on the data accumulated in the Wisconsin time studies. I asked him if that was the same data reflected in A&P Exhibit 8, and he testified it was.

So here we have a body of data which underlies his general proposition, these curves, this table and the brochure.

It seems to me that data having been relied on, I am entitled to introduce conflicting data in his thesis and to determine what other conclusions might be drawn from the same data.

I should also point out that we were advised by the Government long in advance of this hearing, we were given an outline of testimony of Dr. Solverson, to which several exhibits were attached, including Table 1.

It seems to me that has some relevance.

JUNDE HINKES: I don't see it. Are you saying that they must offer in evidence everything they intend to offer in evidence, they must bring to the stand every witness they think they might use? I don't think so.

Was Table 1 used by the witness in preparing his testimony on direct? Apparently it was not.

It is your exhibit, Mr. Falls. Is that right?

MR. FALLS: Table 1, or at least the data described and reflected in Table 1 were used to prepare the two curves which show the relationship to which he testified. Those curves represent data points. The data points are the data points which are described in Table 1. It is just a progression from the data to Table 1 to the curves to the ultimate conclusion.

To put it another way, Your Honor, if I may, after all the witness testified to the relationship which he illustrated by these curves.

Now in effect all I am doing in my exhibits is picking points off those curves.

JUDGE HINKES: Again I don't quite agree with you. He did not testify about these curves. He testified about certain prices or costs. He apparently prepared a curve, and he may have looked at it to refresh his recollection, but that curve is not in the record. It appears nowhere.

MR. FALLS: It would be interesting to review the record to see what he said to us when he was looking at this document.

JUDGE HINKES: In any event it is only what he said. That is my point.

MR. FALLS: It seems to me once he says that a relationship exists by virtue of any data he studied, and that is the only way he could come to this conclusion, I am entitled to inquire into that data and draw whatever conclusions seem to be indicated by the data, or ask him as an expert to testify on what he thinks the data support.

JUDGE HINKES: Now, which of your documents, then, does that?

MR. FALLS: I think they all do.

JUDGE HINKES: Obviously not the thesis documents.

MR. FALLS: All right. There are two categories of documents. One category of documents takes the data and attempts to draw conclusions from them. The other data attempts to reflect possible inconsistencies.

The thesis is one that would reflect possible inconsistencies.

A document, for example, like A&P Exhibit 10, where I have the number 37.52 minutes for full service delivery in a certain bracket, is a document which directly relates to the curve representing the relationship by which the witness testified and to the data on which that curve was based. That number would represent a point on the curve.

JUDGE HINKES: I think first of all that Exhibit 10 is based upon Exhibit 8.

MR. FALLS: That is correct.

JUDGE HINKES: Now then, before we go on to 10, let's be sure that we have a basis for considering the reception in evidence of 8.

Now you say that 8 represents the curve, or the curve represents 8.

MR. FALLS Right. They correspond one to the other.

JUDGE HINKES: That is right. But we don't have the curve in evidence.

MR. FALLS: But we have the witness's testimony about the relationship represented by the curve.

JUDGE HINKES: Yes. All right.

To that extent, what is the objection, then, of Complaint Counsel to reception in evidence of 8?

MR. SOEFFING: We never talked about 8. We used the illustration merely to point out what he testified to.

The testimony standing alone would have proved what he was trying to say, or, in other words, he could have from mere testimony, and he did, through his testimony, describe a certain relationship.

The graph was merely used by him as sort of a picture form of this as he went along. He never vouched for the number of units on the graph or the minutes per delivery on the graph.

I would point out that one of the exhibits here by Respondent's counsel is time and cost savings per point between full service and modified drop service using Solverson data submitted in evidence.

That is exactly our point. There is no Solverson data submitted in evidence. He gave general testimony about a relationship. That is all he did. We didn't put any data in this record.

I think that they are going beyond the direct examination if they try to do it.

Furthermore, nothing they have shown here is inconsistent with his general testimony.

JUDGE HINKES: Let's take one thing at a time.

The question that I have is whether the witness in some way during his direct examination used specific figures, and, if so, where did he say that he got them?

MR. SOEFFING: I believe it is safe to say he did not use specific figures on his direct examination.

MR. FALLS: It seems to me the Government's position is completely untenable. If they are correct, they can ask a witness to state a conclusion, and if he doesn't give any reasons, then I am precluded from inquiring about it.

He stated a conclusion which necessarily was based and emerged clearly on his testimony on mathematical relationships derived from data.

Once the conclusion is stated based on the relationship that in terms comes from the data, it seems to me it is one of the most important functions of cross-examination to be able to get at that data and see what the consequences are in every direction.

JUDGE HINKES: All right. I presume that you believe that you did ask the witness where he got the data. Is that correct?

MR. FALLS: Yes, and he told me.

JUDGE HINKES: Where did he say he got the data?

MR. FALLS: He said he got it from his time studies.

JUDGE HINKES: He then referred to a particular tim study?

MR. FALLS: He referred to a series of time studies which he conducted in collaboration with the Wisconsin Department of Agriculture. He said he went out on the trucks, used a stop watch and came up with numbers as shown on Table 1 from which he drew the conclusions to which he has testified.

JUDGE HINKES: Is that your Exhibit 9, Special Bulletin 83?

MR. FOLEY: Yes, it is.

MR. FALLS: This is an official publication of the data on which his testimony was based.

JUDGE HINKES: Is there any dispute that he did say that he based his testimony upon the figures that he arrived at in his Special Bulletin 83?

MR. SOEFFING: Yes, I think there is. I think he was testifying on direct as to what he knew from his general experience as an expert.

Now, Mr. Falls has made the point that he merely gave the conclusion. Now that is what experts are entitled to do, reach a conclusion or give an opinion.

He based his opinion on information on various delivery systems and what the trend was when you used them. That is all he did.

JUDGE HINKES: We have gone beyond that point.

When an expert gives his opinion, in cross-examination he may be asked on what he bases that opinion. That is what Mr. Falls said he asked, and he found out that he based his opinion upon this Special Bulletin 83, Respondent's Exhibit 9.

Now, is there any dispute so far on that state of facts?

MR. SOEFFING: As I understand, he said certain exhibits he might have prepared were based on 83, but those exhibits were never offered by us in evidence.

As I understand it, his testimony on direct came from his general experiences, which included this. We are not going to deny and say he operates in a vacuum, but on direct he testified from a great number of sources. As he testified on redirect, he studied other studies.

I might also point out that he testified in his direct testimony that this general relationship not only holds true for modified drop and full service but drop, also.

If you look at the chart, you will see there is no line in there for drop. This is all pure testimony.

MR. FALLS: After all, this was shown to him during his testimony for some reason. I am talking now about the curve. I think Government Counsel indicated that he used it to refresh his recollection.

MR. SOEFFING: I never said that. That was your characterization.

MR. FALLS: It was shown to him so that he could do something with it. If he did something with it, he must have used it to help support him in his general statement.

Those curves go directly to the data reflected in these various exhibits.

If it was just talking from general experience having nothing to do with the time studies, why was it necessary even to hand him these curves?

MR. SOEFFING: I could have had him come in with a blackboard and drawn lines to show relationship.

The mere fact that I used a chart and did not introduce it into evidence was to make it quicker and easier for everyone here does not mean I have to offer it into evidence. He could have taken a blackboard and drawn two lines which would show the relationship.

I am sure at that point Mr. Falls certainly could not have claimed that there was a lot of evidence in the record on which he could base these other figures. I think it is the same thing.

MR. FALLS: It seems to me the scope of cross-examination of an expert witness is broad enough to encompass the data that affects his judgment.

To suggest at this point that this witness's testimony had nothing to do with his principal relevant experience, his principal relevant experience, which was a detailed, comprehensive study which resulted in a brochure, which resulted in calculations, and which resulted in a thesis on exactly this relationship, it seems to me is just to take a man right out of his skin.

JUDGE HINKES: It seems to me that when Dr. Solverm testifies about an economic conclusion, whatever that may be, he may be cross-examined as to his knowledge in that particular field, and that knowledge can be ascertained to some extent by his writings as well as other ways.

Now, he testified to a certain cost behavior in the milk industry and the dairy industry, and to that extent it would appear that a document which he among others is offered discussing that very issue is properly admissible. That is Respondent's Exhibit 9.

MR. FALLS: Let me say, Your Honor, that Respondent's Exhibit 8 reflects the same data that Exhibit 9 does, and since it has been much referred to in the questioning, I think as a matter of convenience it would be helpful if it were left in.

JUDGE HINKES: I was just trying to be sure that I know where the figures come from that are listed in 8. In speaking of comparisons between full service and modified drop service --

MR. FALLS: The figures under full service I think correspond exactly with the figures on Table 1 of page 9 of Exhibit 9, with the exception that some of the brackets have been put together in average form, and I think with the further exception that by the use of Table 1 and Table 2 on page 9 of Exhibit 9 certain additional extrapolations were made in Exhibit 8, which don't depend on additional data but merely on the use of the data already in Exhibit 9.

JUDGE HINKES: In any event the figures you have on 8 were taken from 9, with certain modifications such as extrapolations?

MR. FALLS: Right.

JUDGE HINKES: No other documents were involved?

MR. FALLS: I think that is correct.

JUDGE HINKES: No. 10 is again an extrapolation, an excerpt, rather?

MR. FALLS: That comes directly from 8.

JUDGE HINKES: It comes from 8.

No. 11 is the thesis?

MR. FALLS: That we would offer, Your Honor, as being inconsistent in some respects with the other data.

The thesis itself is 11.

JUDGE HINKES: Now I believe it would be appropriat to receive in evidence 8, 9, and 10.

MR. SOEFFING: What about the hypotheticals?

JUDGE HINKES: Meaning what, now?

MR. SOEFFING: Maybe we have the wrong exhibits.

JUDGE HINKES: No. The hypotheticals were not considered to be appropriate, the hypothetical costs. Items 5 and 6 are stricken on Exhibit 10.

XXXXX

(The documents referred to were received in evidence as Respondent A&P Exhibits 8, 9 and 10.)

JUDGE HINKES: Now with respect to 11, the witness testified he did not use that in his conclusions. It is being offered I presume to demonstrate some inconsistency, therefore, with his testimony.

MR. FALLS: That is correct, to indicate that other data prepared by the same man might, for example, in the full service area, suggest that the costs of service there were even higher than his testimony suggested.

JUDGE HINKES: And thereafter 12, 14 and 15, certainly are based upon that thesis, at least in part.

MR. FALLS: In part on the thesis and in part on the exhibits that we have already referred to.

JUDGE HINKES: Yes, comparisons.

No. 13 I believe is not so. I may be wrong.

MR. FALLS: 13 is based on both Exhibit 8 and on the thesis and on Exhibit 9.

JUDGE HINKES: 13 ought to be admitted, therefore, because that again goes back to the other documents which have been received.

MR. SOEFFING: That means the hypothetical on 13 would be removed?

JUDGE HINKES: Yes. On all of those comparisons which use the hypothetical figures, lines 5 and 6, we are not considering those as part of the offer.

That leaves for consideration now the thesis and Exhibits 13, 14 and 15 which are based in part on the thesis.

Now then, the thesis, of course, was not used by the witness in making his presentation, but it is being offered to demonstrate some inconsistency by this same person in a writing compared to his testimony and on certain other writings made by the same witness.

To that extent I think it has to be received.

MR. SOEFFING: Could I say something?

JUDGE HINKES: Yes.

MR. SOEFFING: I don't think the thesis conflicts with the general testimony. Some figures in the appendix may conflict with some other figures to a very slight degree, but I don't think the thesis contradicts the main testimony, which simply was that there was a narrowing.

JUDGE HINKES: There may not. I can't refuse to admit it and say you can't argue the issue. With the documents in evidence, the issue may be argued.

I am not saying that it differs. But it is being offered for the purpose of making argument on that score. Under all the circumstances, then, it seems to me that the Respondent's exhibits must be received in evidence.

I am only concerned about the thesis being received in its entirety. It is quite a document.

MR. FALLS: What does Your Honor suggest?

JUDGE HINKES: I notice you introduced certain pages of that thesis, 203, 204 and 205. I don't know if you have other pages which you wish to refer to in the thesis. But let me say perhaps we should simply receive those specific pages that you have referred to and reserve to both parties an opportunity to offer in evidence other parts of the thesis if it is desired at a later date, when you have had a chance to review the entire matter and decide on what portions you think are appropriate.

MR. SOEFFING: If he wants the thesis in, I would rather have the whole thesis in.

MR. FALLS: I have no objection.

JUDGE HINKES: Very well. I thought perhaps it was too much of a burden on the parties, but if there is no objection, I think the thesis will have to be received in evidence.

XXXXX (The documents referred to were received in evidence as Respondent A&P Exhibits 12, 13, 14 and 15.)

MR. SOEFFING: I do want to point out one thing. This is the kind of thing to which, as I said, we have been thrown these things at us over the past couple of hours. There are quite a number of them. They are quite detailed. This is the kind of thing I am objecting to.

If you look for RA&PX-15, if you look at the middle of the page, 501-600, they reached an extrapolated time of 57.52. Now, what they did --

JUDGE HINKES: The witness did not accept that extrapolation?

MR. SOEFFING: That is correct.

They took the last difference in minutes, 2.48, and used that with the 57.52, when it is clear that if they had gone on to extrapolate the times, the difference in minutes might very well have been lower.

JUDGE HINKES: Yes, I remember that.

MR. FALLS: I have no objection to striking from the offer that portion of the material which appears below the heavy line on the page, leaving in the footnotes.

JUDGE HINKES: The brackets 501 to 600 and the material which explains time differences will be stricken.

MR. SOEFFING: The point I wanted to make is that I think what Respondent's counsel is trying to do is that they used the general testimony to say, well, in order to understand this very general testimony, we need to look at Table 8, or Table 1, which they call their Exhibit 8. Then they build from Table 8 to all these other documents on which he never testified in direct.

From that they come up with figures like this, where we put in 57.52 plus their own figure. They said, well, we need this to contradict it, so they take a table. From that table they start using all kinds of other charts to prepare hard data, none of which he has had a chance to testify to on direct, and which was on the matter of direct and cross.

JUDGE HINKES: What you say is entirely true, but that is part of cross-examination.

I do think that you may wish to recall Dr. Solverson after you have had a better chance to consider the documents and have him testify further. That is entirely up to you. You are not left without any recourse.

MR. SOEFFING: All right.

JUDGE HINKES: As the case now stands, Dr. Solverson gave his opinion on a state of affairs. On cross-examination there was an attempt made to demonstrate that his statement was not entirely credible by reason of his other writings on the subject.

These other writings have been received in evidence together with some compilations made on such writings.

I don't think that I would say simply because you are not prepared here and now to take Dr. Solverson on redirect and go into these documents that you are therefore unable to do that.

MR. SOEFFING: We don't want to do that. I don't think we are saying that.

JUDGE HINKES: If you decide to later, you have not yet rested, and I would certainly entertain a request for further testimony.

MR. SOEFFING: I think these are points we can brief rather than bring him back in.

We thank you for your courtesy in that regard.

JUDGE HINKES: That is up to you.

I think a mass of data such as we have had here today would surprise no one if there was a call for a look at it.

MR. FALLS: I had asked for various other supporting materials, and the request was apparently acceded to. I doubt very much that after looking at that I will find it necessary for further cross of Dr. Solvarson, but I would like to hold open that possibility.

JUDGE HINKES: You have not yet had the other data given to you?

MR. FALLS: No. I would not expect it to be given in the hearing room today.

JUDGE HINKES: Very well. Certainly the request may be made. If there is any objection, I will hear it, but that doesn't foreclose your making the request and getting a ruling from me on the necessity for it.

Is there anything else that should be taken up at this time?

MR. MATHIAS: No, sir.

JUDGE HINKES: We will recess at this time, resuming at July 9 at 10:00 a.m. for further testimony on behalf of Complaint Counsel.

Thank you.

(Whereupon, at 4:05 p.m., the hearing in the above-entitled matter recessed, to resume at 10:00 a.m., Monday, July 9, 1973.)

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